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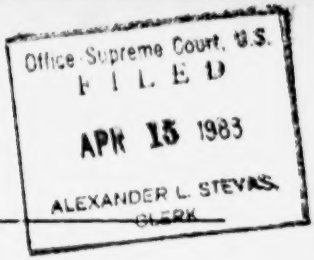

No. 82-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ABDEEN M. JABARA,

Petitioner,

v.

WILLIAM H. WEBSTER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Fourth Amendment permit warrantless surveillance by a Federal agency of the contents of an American citizen's private electronic communications, simply because the agency has the technical capability to monitor the streams of unintelligible signals that carry those communications?

2. Does subsection (e)(7) of the Privacy Act, 5 U.S.C. § 552a(e)(7), permit a Federal agency to maintain, as part of an "intelligence" investigation unrelated to any unlawful activity, records describing a person's exercise of First Amendment rights?

PARTIES TO THE PROCEEDING

Petitioner is Abdeen M. Jabara.

Respondents are William H. Webster, Director, Federal Bureau of Investigation; Lt. Gen. Lincoln Faurer, Director, National Security Agency; William French Smith, Attorney General; L. Patrick Gray, former Acting Director, Federal Bureau of Investigation; Neil J. Welch, Special Agent, Federal Bureau of Investigation; Winston Churchill, Special Agent, Federal Bureau of Investigation; John Doe and Richard Roe, unknown present or former Special Agents, Federal Bureau of Investigation; and James Boe and William Poe, unknown present or former agents or officials of the National Security Agency.

Respondents Webster, Smith, and Faurer are sued in their official capacities; all other respondents are sued in their individual and/or former offical capacities, except for respondent Gray, who remains a defendant in his individual capacity only.

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3 Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Final Report, S. Rep. No. 755, 94th Cong., 2d Sess. (1976) 8

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IN THE
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No. 82-____

ABDEEN M. JABARA,

Petitioner,

v.

WILLIAM H. WEBSTER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Abdeen M. Jabara respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 21, 1982, reversing the judgment of the United States District Court for the Eastern District of Michigan entered in this proceeding on June 13, 1979.

The district court, on motion for summary judgment, had declared (1) that certain warrantless surveillance by the National Security Agency of the contents of petitioner's private overseas electronic communications violated the Fourth Amendment; and (2) that the maintenance by the Federal Bureau of Investigation of certain records describing how petitioner has exercised his First Amendment rights violated subsection (e)(7) of the Privacy Act, 5 U.S.C. § 552a(e)(7). The court below vacated the district court's order enjoining such conduct.

OPINIONS BELOW

The opinion of the court below announcing the judgment at issue is reported at 691 F.2d 272 (6th Cir. 1982), and appears in the appendix hereto ("Pet. App.") at 90. The unreported order of the court below denying the petition for rehearing appears at Pet. App. 104. The unreported dissent of Circuit

Judges Merritt and Jones from the denial of rehearing en banc appears at Pet. App. 107. The opinion of the district court is reported at 476 F. Supp. 561 (E.D. Mich. 1979), and appears at Pet. App. 1. The district court's unreported partial judgment appears at Pet. App. 84.

JURISDICTION

The judgment sought to be reviewed by this petition was entered on October 21, 1982. Pet. App. 90. The order of the court below denying petitioner's timely petition for rehearing was entered on December 17, 1982. Pet. App. 104. The order of the Sixth Circuit denying rehearing en banc was initially entered on December 17, 1982, and subsequently re-entered on December 22, 1982, as amended to include the dissent of Circuit Judge Merritt, in which Circuit Judge Jones concurred. Pet. App. 107. On March 8, 1983, Circuit Justice

O'Connor extended the time in which to file this petition from March 16, 1983, to and including April 16, 1983, the date on which this petition is being filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Privacy Act, subsection (e)(7), 5 U.S.C. § 552a(e)(7):

> (e) Each agency that maintains a system of records shall --

* * *

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity[.]

STATEMENT OF THE CASE

Petitoner is a politically active Michigan lawyer.[1] A second-generation American born to parents of Lebanese origin, petitioner founded and has served as president of the Association of Arab-American University Graduates.[2] Since 1967, he has lectured

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1 Jabara Aff. (July 18, 1973) ¶¶ 1-2. Petitioner received his law degree from Wayne State University Law School in 1966. At all times relevant hereto, petitioner has been a member in good standing of the Bar of the State of Michigan. Id. ¶ 1.

2 Id. ¶ 2. See Supplemental Jabara Aff. in Support of Discovery Motion (Dec. 12,

(Footnote continued.)

and published on issues relating to the Middle East conflict.[3] In the course of his activities, petitioner has decried what he regards as harassment of Arab students by the FBI,[4] and has urged Arabs living in the United States "to mount legal challenges to

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(Footnote continued.)
1974) ¶ 2. The organization is a non-profit, tax-exempt corporation "organized and operating to further the dissemination of accurate and scientific knowledge about the Middle East and improve the bonds among Americans of Arab heritage and between the Arab and American people." Jabara Aff. (July 18, 1973) ¶ 2. Petitioner has been active in the Organization of Arab Students and the Young Socialist Alliance. First Amended Complaint ¶ 12.

3 Jabara Aff. (July 18, 1973) ¶ 2. Petitioner is, among other things, co-editor of The Arab World: From Nationalism to Revolution (Medina U. Press, Ill. 1971), and has served as editor of Free Palestine, a periodical. Plaintiff's Answers to Defendants' First Interrogatories ¶ 1; Jabara Aff. (July 18, 1973) ¶ 2. Some of petitioner's lectures on the Middle East situation, and on United States policy in the Middle East, are recounted in Supplemental Jabara Aff., supra note 2, ¶ 4.

4 First Amended Complaint ¶ 16.

FBI investigations" targeting them.[5]

Beginning at least as early as 1967 and continuing with some interruptions until 1975, petitioner himself became a subject of investigation by the FBI.[6] As part of its investigation, the FBI requested that the NSA supply it with any information concerning petitioner that might "come into" the NSA's possession.[7] The NSA, without first ob-

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5 476 F. Supp. 561, 574 (E.D. Mich. 1979), Pet. App. 48. See also First Amended Complaint ¶ 2; Supplemental Jabara Aff., supra note 2, ¶ 3.

6 476 F. Supp. at 564, Pet. App. 3.

7 Answer to First Amended Complaint by Defendants Levi, Kelley, Welch, and Churchill ¶ 19. The FBI's investigatory tactics also included physical surveillance by informants and agents, inspection of petitioner's bank records, warrantless electronic surveillance, interviews of third parties regarding petitioner, and the maintenance and dissemination of information acquired during the investigation. 476 F. Supp. at 564, Pet. App. 6.

taining a warrant, intercepted and summarized for the FBI a series of petitioner's private overseas electronic communications.[8]

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8 476 F. Supp. at 577, Pet. App. 58; Answer to First Amended Complaint, supra note 7, ¶ 17.

International electronic communications channels are monitored by the NSA at the request of the FBI, the CIA, the Department of Defense, and other Federal agencies. See 5 Intelligence Activities -- S. Res. 21: Hearings Before the Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, 94th Cong., 1st Sess. 9-12, 20 (1976) (statement of Lt. Gen. Lew Allen, Jr., Director, NSA) ["5 Intelligence Activities"]; Halkin v. Helms, 598 F.2d 1, 4 (D.C. Cir. 1978). The agency "picks up all communications carried over a specific link that it is monitoring," using a technique that has been described as "analogous to a vacuum cleaner." 3 Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Final Report, S. Rep. No. 755, 94th Cong., 2d Sess. 741 (1976). The signals that carry the electronic communications through such channels may be reduced to intelligible form when the NSA's computers are instructed to target such key features as specified names or words mentioned in a communication. See Halkin v. Helms, 598 F.2d at 4 (describing process). By such means, particular com-

(Footnote continued.)

At no time during the seven years of FBI investigation did any evidence emerge "linking [petitioner] to the commission or anticipated commission of any specific crime."[9] Moreover, no evidence was ever

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(Footnote continued.)
munications, targeted for interception from among the unintelligible signal streams the NSA indiscriminately monitors, are rendered available for human examination. See 5 Intelligence Activities, supra, at 19 (statement of Lt. Gen. Lew Allen, Jr., Director, NSA). See generally Note, Government Monitoring of International Electronic Communications: National Security Agency Watch List Surveillance and the Fourth Amendment, 51 S. Cal. L. Rev. 429 (1978).

9 476 F. Supp. at 564, Pet. App. 4. Defendants admitted that, with one exception, the information they collected on petitioner was not collected "pursuant to a criminal investigation." Answer to First Amended Complaint, supra note 7, ¶ 10. The FBI/NSA surveillance of petitioner's overseas communications "was not incidental to the investigation of non-parties" -- that is, was not conducted in the course of monitoring other individuals or organizations. 476 F. Supp. at 577, Pet. App. 59. The district court stated that "the record . . . does not disclose any reason for the targeting and examination of these communications other than
(Footnote continued.)

produced "to establish that Jabara or the domestic organization to which he belongs has been implicated in any way with a foreign agent or organization or acting in collaboration with a foreign power."[10] Despite the utter lack of such evidence, and despite the lack of any evidence "implicat[ing] na-national security,"[11] the FBI has disseminated information regarding petitioner -- including information received from the NSA -- to 17 government agencies, three foreign governments, and other persons outside the FBI.[12]

(Footnote continued.)
the fact that Jabara was a party to them." Id., Pet. App. 60. See also id. at 579 n.12, Pet. App. 67 n.12.

10 476 F. Supp. at 579, Pet. App. 68.

11 476 F. Supp. at 574, Pet. App. 48. This and other factors led the district court to conclude that the FBI's investigation may not have been "wholly prompted by legitimate or good faith national security concerns." Id. at 574-75, Pet. App. 48.

12 Id. at 565, Pet. App. 7; id. at 577, Pet. App. 58.

On October 19, 1972, petitioner, seeking declaratory and injunctive relief, filed suit in the district court, alleging that the investigatory tactics deployed against him by FBI officials violated his First, Fourth, Fifth, and Ninth Amendment rights.[13] Petitioner subsequently amended his complaint to allege that the FBI's maintenance of records describing how he exercised rights protected by the First Amendment violated provisions of the Privacy Act, 5 U.S.C. § 552a.[14] Named as defendants

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13 Complaint ¶¶ 9-12. NSA officials were subsequently joined as defendants. Second Amended Complaint ¶¶ 9-10.

14 Second Amended Complaint ¶ 58. Petitioner also amended his complaint to add claims for damages under 18 U.S.C. § 2520 and under the First, Fourth, Fifth, and Ninth Amendments. First Amended Complaint at p. 15. The district court subsequently bifurcated the suit with respect to the issues of liability and damages. 476 F. Supp. at 565 n.1, Pet. App. 10 n.1. Only the disposition of petitioner's claim for declaratory and

(Footnote continued.)

were the Attorney General, the Director of the FBI, the Director of the NSA, and several named and unnamed agents and employees of the FBI and NSA.[15]

Following five years of litigation over contested discovery matters,[16] defendants and plaintiffs filed cross-motions for summary judgment.[17] In a judgment entered on June 13, 1979, the district court held that the warrantless examination of the contents of petitioner's private overseas com-

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(Footnote continued.)
injunctive relief is before this Court. See id.

15 Complaint ¶ 3; First Amended Complaint ¶¶ 3-9; Second Amended Complaint ¶¶ 2-11.

16 See Jabara v. Kelley, 62 F.R.D. 424 (E.D. Mich. 1974); Jabara v. Kelley, Civ. No. 39065 (E.D. Mich. June 27, 1975) (unpublished opinion); Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977).

17 See Joint Appendix on Appeal to Sixth Circuit at 78-82. Defendants also sought dismissal of the First and Second Amended Complaints.

munications violated the Fourth Amendment.[18] Stressing that no evidence had been produced to establish that petitioner was a foreign agent or was acting in collaboration with a foreign power, the district court concluded that the Fourth Amendment violation was "clear."[19]

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18 476 F. Supp. at 578-79, Pet. App. 65-68. Because defendants had admitted "the threshold and ultimate issue" -- that the NSA had intercepted petitioner's overseas communications, and had targeted them for transmission to and examination by the FBI -- the district court concluded that "resort need not be made to privileged material to establish a violation of [Jabara's] constitutional rights." 476 F. Supp. at 578, Pet. App. 63.

19 476 F. Supp. at 579, Pet. App. 68 (footnote omitted). The district court enjoined the Director of the NSA "from using plaintiff's name or other personal identifier as a means for selecting foreign cable communications for analysis, summary, examination or dissemination without first obtaining a judicial warrant pursuant to procedures provided for by applicable law." Partial Judgment ¶ 5, Pet. App. 86-87. The court further enjoined "[a]ll remaining defendants not employed by the [NSA] . . . from requesting

(Footnote continued.)

The district court also held that the FBI's maintenance of records describing petitioner's exercise of First Amendment rights violated subsection (e)(7) of the Privacy Act, 5 U.S.C. § 552a(e)(7), on the ground that the "intelligence" investigation to which the FBI's records were said to relate was not focused on any "specific past, present or future criminal acts."[20] Hence, the court ruled, the maintenance of such records could not be justified under subsection (e)(7) as being "pertinent to and within the scope of an

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(Footnote continued.)
the [NSA] to use plaintiff's name or other personal identifier as a means for selecting copies of plaintiff's foreign communications or communications to plaintiff from a foreign origin for analysis, review, summary or dissemination without first obtaining a judicial warrant pursuant to procedures provided by applicable law." Id.

20 476 F. Supp. at 581, Pet. App. 77.

authorized law enforcement activity."[21]

On appeal, the Sixth Circuit held that the district court had erred in granting petitioner's motion for summary judgment on both the Fourth Amendment and Privacy Act issues.[22] On the Fourth Amendment issue, the court ruled that no warrant was required for the NSA's general monitoring of the channels that carried petitioner's private communications,[23] and therefore that no

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21 Id. The district court enjoined defendants and their successors in office "from recording, maintaining, using or disseminating information about the Plaintiff's political beliefs, communications, speeches, writings, associations or activities, both public or private, which do not relate to specific criminal acts." Partial Judgment ¶ 9, Pet. App. 88-89.

22 The district court on March 11, 1980, had denied defendants' motion for reconsideration. Pet. App. 83A.

23 691 F.2d at 277-78, Pet. App. 93-99.

warrant was required for the NSA to select, reduce to intelligible form, and examine petitioner's private communications carried over those channels.[24] Analogizing the unintelligible electronic signals scanned by the NSA to papers lawfully seized by an arson investigator at the scene of a fire under the "plain view" exception to the warrant requirement,[25] the Sixth Circuit ruled that the warrantless interception and examination of the contents of petitioner's communications, and their dissemination to the FBI, could not violate the Fourth Amendment.[26]

Petitioner argued that, whatever the propriety of warrantless NSA monitoring of the

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24 Id. at 278-79, Pet. App. 100-01.

25 Id. at 277, Pet. App. 97, citing United States v. Gargotto, 476 F.2d 1009 (6th Cir. 1973), cert. denied, 421 U.S. 987 (1975).

26 691 F.2d at 278-79, Pet. App. 100-01.

streams of unintelligible signals that carried his electronic communications, his Fourth Amendment rights were violated when the NSA targeted his private communications for interception, and reduced the signals that carried those communications to intelligible form.[27] The court below acknowledged

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27 Brief for Plaintiff-Appellee 20-21. Petitioner noted that before the signals that carried his messages were reduced to intelligible form, his communications were "not open to scrutiny by either an 'intruding eye' or an 'uninvited ear.' Katz v. United States, 389 U.S. 347, 352 (1967)." Id. at 21. In support of this argument, petitioner cited Walter v. United States, 447 U.S. 649 (1980), which involved the warrantless opening of film boxes in the FBI's possession, and the subsequent viewing of the films by the FBI. Plaintiff-Appellee's List of Citations Updating Brief at 2. As petitioner noted, this Court held in Walter that "[t]he fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents." 447 U.S. at 654.

that petitioner had "an actual (subjective) expectation of privacy when he sent [his] telegraphic messages overseas,"[28] but simply denied that any illegal search and seizure occurred when his messages were selected for interception and reduced to intelligible form.[29]

The Sixth Circuit also held that the district court had incorrectly construed subsection (e)(7) of the Privacy Act. Rejecting the district court's construction of the subsection's "law enforcement activity" exemption as "too narrow,"[30] the court below held without explanation that the exemption permits the FBI to maintain records relating to an individual's exercise of First Amendment rights

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28 691 F.2d at 278, Pet. App. 100 (emphasis added).

29 Id.

30 691 F.2d at 280, Pet. App. 103.

even if incident to an "intelligence investigation" unrelated to any unlawful activity.[31] The court remanded the cause to the district court to apply the "correct legal standard."[32]

On December 17, 1982, the court below denied rehearing.[33] Rehearing en banc was denied over the dissent of Circuit Judges Merritt and Jones, who stated their view that petitioner's Fourth Amendment rights "were probably violated" by the FBI/NSA surveillance, and that "the issue is of sufficient importance to require a hearing by the full Court."[34]

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31 Id. at 279-80, Pet. App. 102.

32 Id. at 280, Pet. App. 103.

33 Pet. App. 104.

34 Pet. App. 107.

REASONS FOR GRANTING THE WRIT

1. The judgment below squarely conflicts with this Court's holding in Katz v. United States, 389 U.S. 347 (1967), that warrantless government surveillance of a person's private communications violates the Fourth Amendment even where no "physical intrusion into any given enclosure" is involved. Id. at 353. The judgment below mocks that holding by allowing a person's private electronic communications to be intercepted and examined without a warrant simply because the government has the technical capability to monitor the unintelligible signal streams that carry those communications. But to hold that a person's expectations of privacy in his communications are thus to be measured by the government's capacity to defeat them by means of advanced technology is to obliterate the fundamental distinction between public and private that

alone renders the Fourth Amendment's protections meaningful.

The court below confused the channels through which petitioner's communications were sent with the contents of the communications themselves -- an error of constitutional magnitude. Just as the daily collection of the mail by the United States Postal Service does not entitle any government agency, without a warrant, to open and read the sealed envelopes thus collected,[35] so the monitoring of undifferentiated streams of signals carrying private electronic communications does not entitle government agencies to intercept and examine those communications without

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35 See, e.g., Birnbaum v. United States, 588 F.2d 319, 324 (2d Cir. 1978), citing Ex parte Jackson, 96 U.S. 727, 733 (1878).

a warrant. Without a warrant, a government agency is no more free to intercept and examine the contents of a person's private electronic communications than it is to open and read his mail or to wiretap his telephone.

The sweep of the judgment challenged herein makes plenary review by this Court especially critical. On the analysis of the court below, it is immaterial whether a person claiming illegal surveillance of his private overseas communications is a foreign agent or acting in collaboration with a foreign power, or whether national security is implicated.[36] Indeed, under the court's rea-

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36 See supra page 10. Thus, this case presents no occasion for this Court to consider whether warrantless targeting and interception of an individual's private overseas communications is permissible where the individual is a foreign agent or acting in collaboration with a foreign power, or where national security is implicated. Cf. Hon. Griffin B. Bell, Electronic Surveillance and the Free Society, 23 St. Louis U.L.J. 1, 4 (1979)
(Footnote continued.)

soning, it is immaterial whether the person's electronic communications are international or purely domestic. For according to the court below, it is the fact that a government agency has the technical capability to monitor the channels through which the unintelligible signals carrying a person's communications are sent that renders lawful the warrantless interception and examination of particular communications carried over those channels. A more frightening and far-reaching repudiation of Katz and its progeny can scarcely be imagined. Review on this issue should therefore be granted.

2. The court below also erred in concluding that Congress, when it enacted the "law enforcement activity" exemption to sub-

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(Footnote continued.)
(noting "the need to do away with all-purpose incantations about national security").

section (e)(7) of the Privacy Act, intended to permit the FBI to maintain, as part of an "intelligence" investigation unrelated to any unlawful activity, records describing an individual's exercise of his First Amendment rights. The legislative history of the Privacy Act and of the provision here at issue, the interpretation of that provision by the D.C. Circuit in Albright v. United States, 631 F.2d 915 (D.C. Cir. 1980), and the Attorney General's and contemporaneous judicial interpretation of parallel language in the Freedom of Information Act, 5 U.S.C. § 552(b)(7), render untenable the Sixth Circuit's construction. Moreover, the Sixth Circuit's construction of subsection (e)(7)'s "law enforcement activity" exemption squarely conflicts with the Eleventh Circuit's construction in Clarkson v. IRS, 678 F.2d 1368, 1375 (11th Cir. 1982). Finding the "balance struck by the [district] court in

Jabara . . . appropriate," the Eleventh Circuit held that any investigation by the Internal Revenue Service, pursuant to which First Amendment records are maintained under subsection (e)(7)'s "law enforcement activity" exemption, must be related to some past, present, or anticipated statutory violation. Id.

Because the Sixth Circuit's construction of subsection (e)(7)'s "law enforcement activity" exemption would defeat the purposes of the subsection and of the Privacy Act as a whole; because of the widespread application of subsection (e)(7) and its direct bearing on the exercise of fragile First Amendment freedoms; and because the Sixth Circuit "has rendered a decision in conflict with the decision of another federal court of appeals on the same matter," Supreme Court Rule 17.1(a), the proper construction of the provision is an issue that warrants plenary review by this Court.

I.

The Sixth Circuit's Holding that the Fourth Amendment Permits Warrantless Surveillance of The Contents of An American Citizen's Private Electronic Communications Is Squarely in Conflict with Katz v. United States and Its Progeny

Although, as the court below observed, the monitoring of petitioner's messages involved "sophisticated, high-technology methods and equipment," 691 F.2d at 278, Pet. App. 99, the applicable constitutional principle could not be more old-fashioned: "[T]he broad and unsuspected governmental incursions into conversational privacy which electronic surveillence entails necessitate the application of Fourth Amendment safeguards." United States v. United States District Court, 407 U.S. 297, 313 (1972) (footnote omitted). See Katz v. United States, 389 U.S. 347, 351-52 (1967). Yet just those safeguards were sacrificed by the court below in the name of the advanced technology employed in this case.

The court below incorrectly supposed that the fact of the NSA's monitoring of the channels through which petitioner's communications were sent rendered unreasonable any expectation he had that the actual contents of those communications would remain private. Thus, even though the court acknowledged that petitioner had "an actual (subjective) expectation of privacy when he sent [his] . . . messages overseas," 691 F.2d at 278, Pet. App. 100 (emphasis added), the court nevertheless concluded that no constitutional injury occurred when the actual contents of his private communications were intercepted and examined without a warrant.

But it was precisely at the moment of such interception and examination that petitioner's "reasonable expectation of privacy" in his electronic communications was invaded. Until that moment, the contents of his messages were not open to scrutiny by either an "intruding

eye" or an "uninvited ear." Katz, 389 U.S. at 352. Cf. Smith v. Maryland, 442 U.S. 735, 743 (1979) (distinguishing between privacy expectation as to the telephone number a person dials, and as to "the contents of his conversation") (emphasis in original). And the intrusion that occurred resulted not from any mere augmentation of "the sensory faculties bestowed upon [the defendants] at birth," United States v. Knotts, 51 U.S.L.W. 4232, 4234 (U.S. Mar. 1, 1983), but from the technological transformation of the electronic signals carrying petitioner's private communications -- signals otherwise unintelligible by human beings, no matter how augmented their natural faculties.

The act of reducing petitioner's communications to intelligible form parallels the opening of the boxes of film in Walter v. United States, 447 U.S. 649 (1980), the opening of the luggage in Arkansas v. Sanders, 442

U.S. 753 (1979), and the opening of the footlocker in United States v. Chadwick, 433 U.S. 1 (1977). The fact that the boxes of film in Walter, the luggage in Sanders, and the footlocker in Chadwick were lawfully within the government's possession at the time did not relieve the government of its obligation to secure a warrant before examining the contents of those containers.

So, too, the fact that streams of unintelligible electronic signals might lawfully be monitored without a warrant -- a point petitioner does not concede -- cannot relieve the government of the obligation to secure a warrant before intercepting and examining the contents of the communications those signals carry. The Fourth Amendment "safeguard[s] individuals from unreasonable governmental invasions of legitimate privacy interests." Chadwick, 433 U.S. at 11. Those interests are rendered no less legitimate, nor

the governmental invasions of such interests any more reasonable, simply because electronic communications are involved. See Katz, 389 U.S. at 352; United States v. United States District Court, 407 U.S. at 312-13.

To answer that intercepting and reducing otherwise unintelligible signals to intelligible form is nothing more than "scientific enhancement" of natural human faculties, compare Knotts, 51 U.S.L.W. at 4235, would be to negate the very concept of an "intrusion" -- reasonable or otherwise.[38] It was precisely so frightening a prospect that this

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38 In Knotts, by contrast, this Court stressed that "there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin." 51 U.S.L.W. at 4235. The "scientific enhancement"

(Footnote continued.)

court squarely foreclosed in Katz, holding that the Fourth Amendment's reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U.S. at 353. That the "intrusion" in this case may have involved plucking messages from airwave channels can make no constitutional difference. The "unjustifiable intrusion . . . upon the privacy of the individual," Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), occurred

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(Footnote continued.)

afforded by the beeper in Knotts merely enabled the police to keep track of a moving car after its driver had resorted to "evasive maneuvers." Id. at 4233. No invasion of privacy was therefore involved; no expectation of privacy was defeated. This Court stressed that "scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise." Id. at 4235 (emphasis added). See also id. at 4236 (Stevens, J., joined by Brennan & Marshall, JJ., concurring in judgment).

when the contents of petitioner's messages were rendered intelligible.

Apparently regarding petitioner's communications as being, in effect, within "earshot" of anyone who can "hear" the signals that carry them, the court below treated petitioner's communications as being entitled to no greater Fourth Amendment protection than "conversations in the open." Katz, 389 U.S. at 361 (Harlan, J., concurring). But it was impossible for anyone to "hear" petitioner's communications until the signals that carried them were intercepted and rendered intelligible by the NSA.[39] And contrary to

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39 Compare Hester v. United States, 265 U.S. 57 (1924); Florida v. Brady, 406 So.2d 1093 (Fla. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982) (No. 81-1636); Oliver v. United States, 686 F.2d 356 (5th Cir. 1982), cert. granted, 51 U.S.L.W. 3552 (U.S. Jan 25, 1983) (No. 82-15); United States v. Dunn, 674 F.2d 1093 (5th Cir.), petition for cert. filed, 51 U.S.L.W. 3260 (U.S. Oct. 5, 1982) (No. 82-508). See also Knotts, 51 U.S.L.W. at 4235-36 (Blackmun, J., joined by Brennan, Marshall & Stevens, JJ., concurring in judgment).

another metaphor misapplied by the court below, the electronic communications transmitted by petitioner were no more in "plain view" when the signals that carried them were monitored by the NSA than was the film in the boxes in Walter when seized by the police.[40]

The judgment below rests on no narrow exception to generally applicable Fourth Amendment protections. This case does not involve any considerations peculiar to surveillance of international, as distinct from purely domestic, communications. Nor is there any claim of exigency here that could justify waiving the warrant requirement. Compare,

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40 See supra page 16. If petitioner's messages had been intelligible when monitored, the constitutional injury would indeed have occurred fully at that point; in such circumstances, the monitoring itself would have constituted a warrantless wiretap, violating petitioner's reasonable assumption that the messages he has transmitted "will not be broadcast to the world." Katz, 389 U.S. at 352.

e.g., Coolidge v. New Hampshire, 403 U.S. 443, 459-64 (1971); Camara v. Municipal Court, 387 U.S. 523, 539 (1967). Grounded, instead, in the premise that the warrant requirement simply does not apply whenever sophisticated technology enables the government to "perceive" otherwise private communications, the judgment below baldly repudiates the teachings of Katz and its progeny.

Should the judgment below escape this Court's plenary review, government officials would have a green light to ignore Katz -- not simply with respect to surveillance of overseas communications, but with respect to surveillance of domestic communications as well. At its narrowest, the judgment below stands for the unacceptable proposition that the Fourth Amendment is inapplicable to the interception of overseas communications so long as the NSA supplies the tools of such surveil-

lance. Taken to its logical conclusion, the judgment below embodies the view that the Fourth Amendment can no longer shield a person's private communications from surveillance so long as the means employed by the government to intercept and examine such communications are sufficiently sophisticated.

The resulting chill on private expression would be incalculable.[41] Without any warrant requirement to limit the gov-

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41 Especially where, as here, "First Amendment interests would be endangered by a search," "the courts [must] apply the warrant requirements with particular exactitude." Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978). See also Stanford v. Texas, 379 U.S. 476, 482-85 (1965); United States v. United States District Court, 407 U.S. 297, 313-14 (1972). The possibilities of "abuse," Zurcher, 436 U.S. at 566, inherent in such "dragnet type . . . practices" as those employed here, Knotts, 51 U.S.L.W. at 4235, cannot be overstated.

ernment's ability to transform the private into the public at will, the Fourth Amendment's protections themselves would quickly lose all meaning. The rule announced by the court below would thus render the Fourth Amendment no more than "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." Edwards v. California, 314 U.S. 160, 186 (1941) (Jackson, J., concurring). Neither the Fourth Amendment nor this Court's precedents can countenance any such result. Accordingly, review on this issue should be granted.

II.

The Sixth Circuit's Construction of Subsection (e)(7) of the Privacy Act Conflicts With the Eleventh Circuit's Construction of the Subsection and Undermines the Aims of the Privacy Act as a Whole.

Wholly apart from its judgment with respect to the Fourth Amendment issue, the

court below erred in holding that subsection (e)(7) of the Privacy Act, 5 U.S.C. § 552a-(e)(7), permits the FBI to maintain records describing an individual's exercise of First Amendment rights as part of an "intelligence" investigation unrelated to any unlawful activity. This construction of the subsection is untenable, squarely conflicts with the construction given by the Eleventh Circuit in Clarkson v. IRS, 678 F.2d 1368 (11th Cir. 1982), and undermines the fundamental aims of the Privacy Act as a whole.[42]

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42 The record below established that the FBI's maintenance of records relating to petitioner's political activities did not relate to investigation of any unlawful conduct. See 476 F. Supp. at 581, Pet. App. 78-79. Thus, the FBI's maintenance of records describing petitioner's First Amendment activities could be justified, if at all, only by construing the "law enforcement activity" exemption of subsection (e)(7) to include "intelligence" investigations unrelated to any unlawful activity. Petitioner does not contend that the "law enforcement activity" ex-

(Footnote continued.)

The legislative history of subsection (e)(7) establishes that the provision was intended to preclude agencies from maintaining records of First Amendment activities in connection with "intelligence" investigations, where such investigations do not focus on specific unlawful activity. Thus, Rep. Moorhead, presenting H.R. 16373 to the House sitting as a Committee of the Whole, explained that the bill would permit the government to maintain records on political activists as part of "[l]awful criminal investigations," but not

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(Footnote continued.)

emption necessarily requires an investigative focus on specific criminal activity; nor did the Eleventh Circuit in Clarkson understand the district court in this case to have imposed such a requirement in every situation. See 678 F.2d at 1375.

on those simply "exercising first amendment rights."[43] And although Rep. Ichord, in discussing on the House floor the specific "law enforcement activity" exemption ultimately enacted in subsection (e)(7), see Source Book on Privacy, supra note 43, at 901, emphasized that such activity might include "legitimate national or internal security intelligence and investigations," id. at 902, such investigations were understood by Congress, in this context, not to entail "collection of protected information . . . about

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43 Senate Comm. on Government Operations & Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations, Legislative History of the Privacy Act of 1974, S. 3418 (Pub. L. No. 93-579): Source Book on Privacy, 94th Cong., 2d Sess. 885 (1976) (Joint Comm. Print) ["Source Book on Privacy"].

law-abiding Americans." Id. at 210.[44] The Privacy Act as a whole was "designed to prevent

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44 Reprinting Protecting Individual Privacy in Federal Gathering, Use, and Disclosure of Information, S. Rep. No. 1183, 93d Cong., 2d Sess. 57 (1974) (accompanying S. 3418). See Source Book on Privacy, supra note 43, at 903 (Rep. Ichord acknowledging that "no file would be kept of persons who are merely exercising their constitutional rights"). Indeed, the "law enforcement activity" exemption was repeatedly referred to on the House floor as the "criminal exemption," see id. at 885-86 (emphasis added), suggesting that some in Congress deemed the exemption to require an investigative focus on specific criminal misconduct, and not, alternatively, on conduct that could give rise simply to civil or administrative sanctions. To be sure, not every "intelligence" investigation focuses on unlawful activity; but only those that do may come within the rubric of "law enforcement activity" within the meaning of subsection (e)(7).

Although S. 3418, as reported, did not include the "law enforcement activity" exemption, it did include a much broader exemption -- one that would have allowed the maintenance of records describing the political activities of individuals if the agency head determined that doing so was required for "the administration of a statute." See Source Book on Privacy, supra note 43, at 988

(Footnote continued.)

the kind of illegal, unwise, over-broad, investigation and record surveillance of law-abiding citizens which [had] resulted in recent years from actions of some over-zealous investigators, [and] from the curiosity of some government administrators." Source Book on Privacy, supra note 43, at 867 (statement of Sen. Ervin, sponsor of S. 3418). By enacting the "law enforcement activity" exemption,

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(Footnote continued.)
(Staff Analysis of House and Senate Compromise Amendments to Federal Privacy Act). But the Senate bill's exemption, broader than the exemption ultimately enacted, would itself clearly have precluded the maintenance of records on an individual's exercise of First Amendment rights where no specific unlawful activity was involved. Source Book on Privacy, supra note 43, at 209-10, S. Rep. No. 1183, supra, at 56-57. Not only did the compromise bill narrow the exemption; it also broadened the subsection's protection of First Amendment rights. See Source Book on Privacy, supra note 43, at 988 (Staff Analysis of House and Senate Compromise Amendments to Federal Privacy Act).

"Congress did not intend to dilute the guarantees of the First Amendment by authorizing the maintenance of files on 'persons who are merely exercising their constitutional rights.'" Clarkson v. IRS, 678 F.2d at 1374.[45]

The view that the "law enforcement activity" exemption requires investigative focus on specific unlawful activity is buttressed by the common understanding of parallel language in subsection (b)(7) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7) ("Exemption 7"), exempting from disclosure under the FOIA certain "investigatory files compiled for law enforcement purposes." As Attorney General Levi explained, records of general information-gathering for monitoring purposes are not for "law enforcement purposes" under

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45 Quoting Office of Management and Budget, Privacy Act Guidelines, 40 Fed. Reg. 28,965 (1975) (quoting 120 Cong. Rec. H. 10,892 (daily ed. Nov. 20, 1974) and H10, 952 (daily ed. Nov. 21, 1974)).

Exemption 7 "except where the purpose for which the records are held and used by the agency becomes substantially violation-oriented."[46] This view accords with contemporaneous judicial interpretations of the exemption as requiring a showing that the investigatory files "were compiled for adjudicative or enforcement purposes." See, e.g., Rural Housing Alliance v. USDA, 498 F.2d 73, 80 (D.C. Cir. 1974) (per Wilkey, J.) (emphasis in original), reprinted in Source Book on

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46 Memorandum On The 1974 Amendments To Freedom of Information Act (1975) (emphasis added), reprinted in Subcomm. on Government Information & Individual Rights of the House Comm. on Government Operations & Subcomm. on Administrative Practice & Procedure of Senate Comm. on the Judiciary, Freedom of Information Act and Amendments of 1974 (Pub. L. No. 93-502) Source Book: Legislative History, Texts, and Other Documents, 94th Cong., 1st Sess. 516 (1975) (Joint Comm. Print).

Privacy, supra note 43, at 1430, 1436.[47]

A "violation-oriented" construction of subsection (e)(7), unlike the Sixth Circuit's construction, also finds support in the interpretation given the provision by the D.C. Circuit in Albright v. United States, 631 F.2d 915 (D.C. Cir. 1980). There the D.C. Circuit confirmed that Congress intended a broad construction of the subsection's prohibition on maintaining records of First Amendment activities and a narrow construction of the prohibition's exemptions. Id. at 918-20 & n.5.

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47 See also Lamont v. Department of Justice, 475 F. Supp. 761, 774-75 (S.D.N.Y. 1979) (per Weinfeld, J.) ("generalized monitoring and information gathering . . . are not related to the [FBI's] law enforcement duties") (citing subsection (e)(7) and Exemption 7) (discussing period of surveillance of plaintiff when evidence suggested no illegal activity); Committee on Masonic Homes v. NLRB, 556 F.2d 214, 219 (3d Cir. 1977) (files compiled for "law enforcement purposes" within meaning of Exemption 7 "'are the files prepared

(Footnote continued.)

Such an understanding of subsection (e)(7) accords with the Privacy Act's broader mission of "provid[ing] special safeguards whenever the rights of citizens to free speech and expression are involved." Source Book on Privacy, supra note 43, at 1002 (Statement by President Ford on Implementation of Privacy Act of 1974) (Sept. 29, 1975) (emphasis added).

As construed by the court below, subsection (e)(7)'s exemption for records maintained pursuant to "law enforcement activity" would entirely swallow the provision's prohibition on the maintenance of records for

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(Footnote continued.)
by Government agencies to prosecute law violators'" (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). Cf. FBI v. Abramson, 102 S. Ct. 2054, 2060 (1982) (name check summaries developed by the FBI pursuant to White House request for information about certain public personalities "were not compiled for law enforcement purposes" within meaning of Exemption 7).

purely political purposes. For precisely that reason, the Eleventh Circuit in Clarkson v. IRS, 678 F.2d 1368 (11th Cir. 1982), construed subsection (e)(7) much as the district court did in this case -- to require at least some violation-oriented investigative focus before the IRS might maintain records of First Amendment activities under the subsection's "law enforcement activity" exemption.[48] Unless

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48 In Clarkson, the Eleventh Circuit held that subsection (e)(7) was violated "to the extent that the IRS has engaged in the practice of collecting protected information [about plaintiff's activities], unconnected to any investigation of past, present or anticipated violations of the statutes which it is authorized to enforce." 678 F.2d at 1375. The court pointedly noted that the "law enforcement activity" exemption had been criticized as inviting misuse, contrary to the intent of Congress, to "'open[ ] a loophole that threatens to swallow the rule,' and 'may well perpetrate those fishing expeditions' that subsection (e)(7) is designed to preclude.'" Id. at 1374 n.9, quoting Guidebook to the Freedom of Information and Privacy Acts 46, 74-75 n.70 (R. Bouchard & J. Franklin eds. 1980).

anchored to a requirement that any "intelligence" investigation constituting "law enforcement activity" be focused on specific unlawful activity, the subsection's general protection against Big Brother surveillance of entirely lawful political activity would soon be eviscerated.

Because the Sixth Circuit's interpretation of subsection (e)(7) plainly contradicts the intent of Congress, the interpretation of the subsection by the D.C. Circuit in Albright, and the contemporaneous construction of parallel language in the FOIA by the Attorney General and by the courts; and because the Sixth Circuit's construction of the "law enforcement activity" exemption conflicts squarely with the Eleventh Circuit's construction in Clarkson, plenary review on this issue, as well as on the Fourth Amendment issue, is warranted.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the instant petition be granted.

Respectfully submitted,

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* Petitioner acknowledges the assistance of David H. Remes of Kaye, Scholer, Fierman, Hays & Handler, and Lucinda Starrett, a student at the University of Pennsylvania School of Law, in the preparation of this petition.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ABDEEN M. JABARA,

Plaintiff,

v. Civil No. 39065

CLARENCE M. KELLEY, ET AL.,

Defendants.

MEMORANDUM OPINION

This case presents a constitutional and statutory challenge to various practices employed by the National Security Agency, the Federal Bureau of Investigation and several of their agents in conducting an investigation of the plaintiff. Although long, the history of this case is one consisting mainly of contested discovery matters, most of which have involved various privilege claims on the part of the government. See Jabara v. Kelley, 75 F.R.D. 475 (E.D.

Mich. 1977); Jabara v. Kelley, No. 3-9065 (E.D. Mich. June 27, 1975); Jabara v. Kelley, 62 F.R.D. 424 (E.D. Mich. 1974). The motions now before the Court, the defendants' motion to dismiss and for summary judgment and the plaintiff's motion for summary judgment, represent the first time the Court has been called upon to resolve the merits of this suit.

The facts in this case have been developed through a long and tedious process of discovery which has caused the Court a great deal of concern. However, the Court is now satisfied that the plaintiff has received all of the requested discovery materials to which he is entitled. Similarly, the Court is satisfied that the disclosures required of the defendants have not compromised the national security or any ongoing criminal or national security investigation.

Because the Court has upheld certain governmental claims of executive privilege and the state secrets privilege, the following summary of facts is necessarily incomplete. Although the public record is incomplete, the defendants, during the course of this litigation, have submitted various in camera affidavits upon which they now rely in support of their motions.

I FACTS

The plaintiff, Abdeen Jabara, a Detroit attorney, has been and is an active member of or participant in various Arab organizations. Beginning in 1967, the FBI began investigating Jabara and that investigation continued with some interruptions until December, 1975. The investigation, although appearing to have some continuity, involved a plurality of discrete and independent events, each of which has led to some FBI intelligence gathering activity directed at Jabara.

Although the investigation did involve at least one criminal aspect, the record is devoid of any evidence linking the plaintiff to the commission or anticipated commission of any specific crime. Instead, the defendants seek to justify their intrusions into the plaintiff's life as a legitimate national security investigation.

The investigatory tactics employed by the FBI include physical surveillance by informants and agents, inspection of Jabara's bank records, warrantless electronic surveillance by the FBI and NSA, interviews of third parties regarding Jabara and the maintenance and dissemination of information gained during the investigation.

The most frequently used investigatory tactic was the use of informants who reported on Jabara's presence at various public and private political gatherings.

In addition to reporting Jabara's presence at such gatherings, the information supplied by the informant usually included a summary of political discussions or speeches by Jabara. In addition, the FBI file contains several reports which appear to have resulted from the physical surveillance of the plaintiff. The record also supports the conclusion that much of the public and private surveillance of Jabara was the result of incidental contacts. In other words, the presence of FBI informants at meetings and discussions attended by Jabara does not appear to have resulted solely from an investigatory interest in Jabara. Included in information regarding Jabara is data which the FBI has recieved from Zionist sources.

In addition to the surveillance mentioned above and as a part of broader

national security investigation, the FBI sought to obtain information regarding Jabara's bank records. Although there is some dispute regarding the scope of this portion of the investigation, it does appear that the FBI obtained information regarding a deposit to one of Jabara's accounts, revealing the identity of one of his clients.

The record also establishes that Jabara's telephone and wire communications have been intercepted by the FBI and NSA. On several occasions the FBI has incidentally intercepted Jabara communications pursuant to electronic surveillance directed at others. Furthermore, the FBI, as part of its investigation of Jabara, requested that NSA forward to the Bureau any information coming into its possession regarding the plaintiff. Pursuant to this request NSA supplied the FBI with several summaries of Jabara's

foreign wire communications. None of these electronic surveillance activities were conducted pursuant to a warrant.

The information obtained through these various investigatory tactics has been recorded and maintained in FBI files. In addition, the FBI has disseminated information regarding Jabara in its possession to 17 government agencies and three foreign governments.

From this factual basis, Jabara seeks relief pursuant to eight separate causes of action. The first cause of action alleges a violation of the fourth amendment and 18 U.S.C. §§ 2511 and 2520 as the result of the defendants' electronic surveillance of Jabara's telephone and other communications. The second cause of action alleges that the defendants' conduct violated the plaintiff's first amendment rights of freedom of speech and association. The third cause of action alleges warrantless

searches, seizures and collection of information in violation of the first and fourth amendments. The fourth cause of action alleges that the interception of conversations between the plaintiff and his clients violated the clients' sixth amendment rights, and damaged Jabara's professional reputation and his ability to pursue his profession in violation of the first and fifth amendments. The fifth cause of action alleges unreasonable invasions of the plaintiff's privacy in violation of the first, fourth, fifth and ninth amendments. The sixth cause of action alleges that the inspection of the plaintiff's bank records violated the fourth amendment. The seventh cause of action alleges that the conduct of the FBI in this case exceeds its statutory authority and is also beyond the constitutional authority of the executive branch of the federal government. The eighth cause of

action alleges that the defendants have violated various provisions of the Privacy Act by maintaining and disseminating records concerning Jabara's first amendment activities.

As part of the relief sought the plaintiff requests an injunction against the defendants' further interception of his wire communications; an injunction prohibiting the defendants from conducting surveillance, collecting, recording, maintaining, using or disseminating information of any kind about the lawful political, social, banking, telephone and other activities of the plaintiff; a mandatory injunction ordering the defendant FBI to produce before the Court for destruction all records or other materials of any kind maintained by them concerning Jabara's constitutionally

protected activities.[1]

II MOOTNESS

The defendants contend that Jabara's claims for declaratory and injunctive relief should be dismissed as moot because of the current status of the FBI investigation of the plaintiff. First, the FBI, through the affidavit of Special Agent Robert F. Peterson, asserts that in December 1975, it determined that it had no further investigatory interest in Jabara and thereupon terminated its investigation. Second, the defendants have agreed to destroy all files maintained under Jabara's name as requested by Jabara. Third, the FBI has submitted an extensive set of guidelines relating to criminal and security investigations which it contends

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1 Jabara has also submitted a claim for damages. That claim is not at issue here since the Court has bifurcated this suit with respect to the issues of liability and damages.

protects against the possibility of future abusive conduct such as that alleged in the plaintiff's second amended complaint.

While some Courts have refused to grant injunctive relief where official policy revisions have, in effect, made continuation of the challenged conduct impossible, see Washington Free Community, Inc. v. Wilson, 484 F.2d 1078 (D.C. Cir. 1973), and other courts have recognized that injunctions should be cautiously issued against police conduct on the mere possibility that it may be repeated, see Long v. District of Columbia, 469 F.2d 927 (D.C. Cir. 1972), the Court is of the opinion that Jabara's claim for injunctive relief is not moot. The Court has examined the extensive set of regulations submitted by the FBI and cannot conclude that they preclude conduct of the type alleged here. Indeed, many sections of the defendants' brief could, in another context, be used

to support an argument that the FBI's conduct in this case was within the ambit of those regulations. Therefore, the Court cannot conclude that these guidelines would necessarily inhibit future FBI conduct of the kind alleged in this case and, therefore, does not render Jabara's claim for relief moot.

Nor is the Court persuaded that the cessation of the Jabara investigation requires that the plaintiff's claims be dismissed as moot. Numerous Supreme Court antitrust decisions have cautioned against declaring a case moot where the defendant would be free to reinstitute the complained of practice. United States v. Phosphate Export Assn.; 393 U.S. 199 (1968); United States v. W.T. Grant Co., 345 U.S. 629 (1953). This consideration applies with even more force where the defendant, although agreeing to stop the conduct in question, continues to assert its legality.

Walling v. Helmerich & Payne, Inc., 323 U.S. 37 (1944).

Based on these decisions, the Court cannot conclude Jabara's claim for injunctive relief is moot. Although the FBI has claimed to have stopped the Jabara investigation in 1975, neither the Court nor the plaintiff were aware of this fact until October, 1978, when the defendants moved for a summary judgment with respect to the second amended complaint. Furthermore, there is no indication that Jabara's political views or his willingness to assert them have changed. Considering the amount of FBI attention focused on Jabara's political activities, it is hard to conclude that the investigatory interest of the FBI will not be rekindled in the future. Furthermore, given the fervor with which the FBI asserts the legality of its conduct, the Court is of the opinion that the chance of recurrence is all the more probable.

The Court might be persuaded to accept the defendants' argument were the investigation more limited in scope or time. However, given the length of the investigation along with the numerous investigatory tactics employed, the Court finds it difficult to conclude that the FBI would not reinstitute actions against Jabara. Considerations of this type militate against a finding of mootness in cases such as this. Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976).

In sum, the Court is of the opinion that the FBI's posture with respect to the cessation of the challenged conduct along with the existence of what the Court perceives to be important and unresolved legal issues militates heavily against declaring the plaintiff's claim for injunctive relief moot.

The defendants also contend that the

cessation of the Jabara investigation and the willingness of the FBI to undertake file destruction makes the plaintiff's claim for declaratory relief moot. In essence, the defendants maintain that in its present posture the case lacks the immediacy and reality necessary to justify a declaratory judgment. See Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941).

There is no question that a controversy exists with respect to the legality of the defendants' conduct. The only issue is whether the alleged cessation of this activity is sufficient to deprive this case of the required reality and immediacy. In its discussion of mootness with respect to injunctive relief, the Court pointed to many factors which permit an inference that the FBI's investigation of Jabara could well be reopened. This is not a situation where the defendant

has admitted that his conduct is illegal or has forsworn any intent to engage in similar conduct in the future. To the contrary, the defendants earnestly and vigorously assert the legality of their conduct. Furthermore, the defendants have asserted that one of their reasons for attempting to avoid a declaratory judgment in this case is so that they will be unfettered in future investigations of Jabara should such investigations become necessary. Assuming that Jabara continues to publicly and privately espouse his political views, an activity in which the defendants have an apparent interest, the Court cannot conclude that the probability of similar conduct occurring in the future is all that remote. Upon consideration of the above cited factors, therefore, the Court is of the opinion that this case is one where the threat of future investigation is sufficiently real to permit Jabara

to pursue the remedy of a declaratory judgment.

III JUSTICIABILITY

The defendants maintain that Jabara's first amendment claims are not justiciable at least insofar as they relate to certain investigatory practices because his allegations of harm amount to nothing more than a subjective chill of his right of free speech. Within this ostensibly non-justiciable category of claims, the defendants group the following: the use of informers and agents to monitor Jabara's public and private political speeches and discussions; the physical surveillance of Jabara's visible activities on three occasions; interviews with Jabara's neighbors; and the dissemination of information obtained by these means.

The major dispute between the parties with respect to the issue of justiciability is the interpretation to be given to the

Supreme Court decision in Laird v. Tatum, 408 U.S. 1 (1972). In Tatum, the plaintiffs alleged that the United States Army violated their first amendment rights through a program of domestic surveillance. The conduct complained of was part of a system of domestic intelligence collection undertaken by the Army to help it identify possible future civil disorders. The system consisted of the collection of information about public activities thought to have some potential for civil disorder, the reporting of that information to Army Intelligence Headquarters, the dissemination of these reports from headquarters to major Army posts around the country, and the storage of this information in a computer data bank. Much of the information was collected from the news media, but some of it was obtained from civilian law enforcement agencies and Army agents who attended public meetings.

The Supreme Court held that the plaintiffs' allegations regarding this system of data collection failed to present a justiciable controversy because the only harm alleged by the plaintiffs was a "subjective chill" on their first amendment right of free speech. The Court distinguished the plaintiff's allegations from the facts in other cases involving a First Amendment chill by noting:

> In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or "chilling," effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. E.g., Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Lamont v. Postmaster General, 381 U.S. 301 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964). In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the

> agency might in the future take some other and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject of the regulations, proscriptions, or compulsions that he was challenging. Id. at 11.

After noting that the plaintiff's allegations could be labeled as a disagreement with the Executive Branch and that the chill alleged resulted from some "speculative apprehension" that the information obtained would be used against them in the future, the Court held that these "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of present objective harm or a threat of specific future harm." Id. at 14.

The defendants rely on Tatum and subsequent decisions to support their contention that several of Jabara's claims are nonjusticiable. It is true that Tatum and some lower courts have failed to find a

justiciable issue in claims for relief similar to those presented by Jabara. Clearly Tatum forecloses the possibility of a justiciable subjective chill arising from a general system of public surveillance, data gathering and dissemination, absent some sort of harassment. Cases following Tatum have found similar claims to be nonjusticiable. In Donohoe v. Duling, 465 F.2d 196 (4th Cir. 1972), the Court found no justiciable controversy where police conducted surveillance of demonstrations and public vigils and made and retained photographs of the demonstrators. In Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2nd Cir. 1973), the Court failed to find a justiciable controversy where the FBI had obtained records from a bank and a bus company in order to determine the identity and number of persons planning to attend a demonstration. Finally, in Philadelphia

Yearly Meeting of the Religious Society of Friends v. Tate, 519 F.2d 1335 (3rd Cir. 1975), the Court found no justiciable controversy existed with respect to the plaintiffs' claims that their first amendment rights had been chilled by police activities consisting of photography and data gathering at public meetings and the dissemination of this information to other law enforcement agencies.[2]

Despite these cases relied on by the defendants, the Court is of the opinion that Jabara has presented a justiciable first amendment claim. His allegations of a system of independently unlawful intrusions into his life as the result of his

2 Despite this, the Court found that the plaintiffs had alleged sufficient harm as a result of the defendants' failure to restrict disclosure of the information in their possession to police groups and their actual disclosure on national television of the names of the plaintiff organizations and certain of the individual plaintiffs as subjects of police dossiers.

lawfully held and lawfully expressed political views is sufficient to take the chilling effect which he alleges outside the realm of speculation and subjectivity. Unlike Tatum this is not a case where the plaintiff is attacking a general system of intelligence gathering. Nor can the Court say that, as in Tatum, the chill alleged by Jabara results from the mere knowledge that he is being investigated.

The plaintiff alleges that not only has he felt fear at expressing his political views, but that others have been deterred from associating with him because of the FBI investigation. Not only this, but the plaintiff alleges that false and misleading reports of his activities have been accumulated by the FBI and disseminated to other federal agencies and foreign governments. In addition, Jabara has alleged injury to his reputation and legal

business as the result of publicity surrounding the FBI investigation of him.

Case law supports the proposition that allegations such as the ones set forth in this case present a justiciable controversy. For example, in Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976), the Court stated:

> This Court agrees that actions beyond "legitimate surveillance activities" are a proper subject of challenge. Thus, while collection and retention of information, if collected in a legal manner, cannot be challenged, public dissemination of that information in a false or defamatory manner and with no lawful purpose, disruption of legitimate activities, termination of employment, illegal electronic surveillance, and other forms of harassment are subject to challenge as beyond "legitimate surveillance activities." Moreover, even legitimate surveillance activities, if undertaken in conjunction with illegitimate activities in a manner which raises the inference that the motive was intimidation or coercion, would be subject to challenge. Cf. Allee v. Medrano, 416 U.S. 802, 812, 94 S. Ct. 2191, 2198, 40 L.Ed. 2d 566, 578 (1974); United States v. McLeod, 385 F.2d 734, 750 (5th Cir. 1967); Lankford v. Gelson, 364 F.2d 197 (4th Cir. 1966). Even

> a cursory reading of the acts alleged in the complaint raises a sufficient inference to render this action justiciable. Id. at 151.

See also Alliance to End Repression v. Rochford, 407 F.Supp. 115 (N.D. Ill. 1975) (Tatum found inapposite where the plaintiffs alleged that "they were specific objects of both overt and covert surveillance on the part of the defendants"); Paton v. LaPrade, 524 F.2d 862 (3rd Cir. 1975) (sufficient allegation of harm by a high school student whose future job opportunities were threatened by FBI maintenance of a file on her).

Similarly, in Socialist Workers Party v. Attorney General, 419 U.S. 1314 (1974) (Marshall, Circuit Justice), Justice Marshall, in ruling on an application to stay an order entered by the Court of Apeals for the Second Circuit, cautioned against an overbroad application of Tatum to cases where the alleged chill is

specific. In Socialist Workers Party, the plaintiffs challenged the FBI's intention to infiltrate the national convention of the Young Socialist Alliance on the ground that it would dissuade members from attending and would impede the exercise of free speech by those in attendance. Although Justice Marshall resolved the motion for a stay in favor of the government, he rejected the contention that the plaintiffs had failed to present a justiciable controversy:

> In this case, the allegations are much more specific [than those in Tatum]; the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading some YSA delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance. Whether the claimed "chill" is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold jurisdictional question. The specificity of the injury claimed by the applicants is sufficient, under Laird, to satisfy the requirements of Art. III. Id. at 1314.

For the reasons set forth above, the Court denies the defendants' motion to dismiss for lack of justiciability.

IV. CONSTITUTIONAL CLAIMS

The Court's conclusion that Jabara has alleged sufficient harm to state a justiciable claim of course does not establish that he is entitled to relief. In order to establish such entitlement Jabara must show that this injury was the result of violations of his constitutional rights. The major constitutional allegations in the complaint are that Jabara's first and fourth amendment rights were violated by the actions of the defendants.[3]

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3 The plaintiff has also alleged violations of his Fifth, Sixth and Ninth Amendment Rights. The Court will deal with the Sixth Amendment claim later in this opinion. With respect to the claimed violations of the Fifth and Ninth Amendments, the Court is of the opinion that they add nothing to Jabara's other constitutional causes of action and are to be dismissed insofar as they purport to represent independent grounds for relief.

(a) The Fourth Amendment Claims

It is clear to the Court that many of the investigatory practices employed by the defendants are not violative of fourth amendment law. First, there can be no doubt that a person's reasonable expectation of privacy is not violated by physical surveillance in public. Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2nd Cir. 1973). Nor is the use of informants for surveillance purposes violative of the fourth amendment, without some sort of harassment or incitement to crime. Hoffa v. United States, 385 U.S. 293 (1966); Handshu v. Special Services Division, 349 F.Supp. 766 (S.D. N.Y. 1972). Similarly, in United States v. Miller, 425 U.S. 435 (1976), the Court held that the government does not violate a criminal defendant's fourth amendment rights when it reviews his bank records. Jabara seeks to distinguish Miller on the basis that it

involved a criminal investigation. This position is untenable. The Miller court held that the documents in question were the business records of the bank and that a customer had no reasonable expectation of privacy therein:

> The depositor takes the risk, in revealing his affairs to another that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. 425 U.S. at 443.

In light of this broad language, the Court is of the opinion that a distinction based upon the type of investigation involved is without merit. Since Jabara can claim no reasonable expectation of privacy in such records, his fourth amendment rights are not violated by the inspection thereof.

Finally, the Court is of the opinion

that the maintenance and dissemination of information gained through practices not violative of the fourth amendment cannot in and of itself violate the fourth amendment.[4]

For the reasons set forth above, the Court grants the defendants' motion to dismiss with respect to all fourth amendment claims based on physical surveillance, the use of informers, the inspection of bank records and the maintenance and dissemination of information obtained through these practices.

(b) The First Amendment Claims

Jabara's first amendment claims center around the alleged inhibiting effect that the defendants' activities have had upon his first amendment rights of free speech

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4 Although the plaintiff alleges that information so disseminated was in some respects false, this fails to state a fourth amendment cause of action since no independent privacy violation is alleged.

and association. The defendants argue that the plaintiff is not entitled to judgment upon these claims because the first amendment gives him no greater right against governmental investigatory intrusion than the fourth amendment. Accordingly, the defendants argue that a first amendment cause of action cannot be predicated on investigatory tactics, such as those outlined above, which the Court has held to be nonviolative of fourth amendment rights. The plaintiff, on the other hand, argues that several cases have implicitly recognized that the first amendment affords a person greater substantive rights than the fourth amendment.

There is little authority regarding the relationship between the first and fourth amendments in the context of governmental investigations. The most exhaustive and explicit treatment of the issue is contained in Reporters Committee for

Freedom of the Press, et al., v. American Telephone & Telegraph Co., et al., No. 76-2057 (D.C. Cir., August 11, 1978). Reporters Committee involved a challenge by several journalists and newspapers to the practice of a telephone company of providing telephone billing records of journalists' calls to government agents investigating possible crimes. The majority of the Court resolved the first and fourth amendment claims against the plaintiffs. Circuit Judge Wilkey in his opinion for the Court also discussed the relationship of the first and fourth amendments.[5] With respect to the plaintiffs' fourth amendment claims, Judge Wilkey found the telephone company's action indistinguishable from the examination of bank records, and he therefore

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5 This discussion was not joined in by the other judges on the panel and was not necessary to disposition of the case.

found no fourth amendment violation on the authority of Miller, supra. Judge Wilkey then held that because there was no fourth amendment violation there could be no first amendment violation.

He described the plaintiffs' argument as follows:

> The crux of plaintiffs' argument, then, is that they have a right to establish relationships in secret under circumstances in which the Fourth Amendment ensures no secrecy and that they have a right to engage in furtive action free from investigative scrutiny within an arena ordinarily open to such scrutiny. In short, plaintiffs' claim that the zone of privacy guaranteed them by the Fourth and Fifth Amendments does not give them adequate privacy within which to conduct clandestine collection and that they, apart from other citizens, must have a broader zone of privacy.
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> Slip Op. at 43.

and he posited the issue as follows:

> The question thus presented is this: Does the First Amendment afford plaintiffs this extra margin of privacy by imposing substantive or procedural limitations on good faith criminal investigative action above and beyond the limitations imposed by the Fourth and Fifth Amendments.

Judge Wilkey answered this question in the negative:

> In my view, the guarantees of the Fourth and Fifth Amendments achieve their purpose and provide every individual with sufficient protection against good faith investigative action for the full enjoyment of his First Amendment rights of expression. To the extent an individual insists that he must shield himself from the prospect of good faith investigation and operate in secrecy in order to exercise effectively particular First Amendment liberties, he must find that shield and establish that secrecy within the framework of Fourth and Fifth Amendment protections. This is not to say that the First Amendment never gives rise to any privacy-type interests apart from those secured by the Fourth and Fifth Amendments. It does mean, however, that such interests are overridden in criminal cases by the public's interest in effective law enforcement investigation at least insofar as they go beyond protections already afforded by the Fourth and Fifth Amendments.
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> Slip Op. at 44.

In reaching this conclusion, Judge Wilkey relied on a long line of cases involving varying fact situations. He placed principal reliance on Zurcher v.

Stanford Daily, 436 U.S. 547 (1978), where police had searched the offices of a college newspaper pursuant to a valid search warrant. The District Court granted the plaintiff journalists' request for declaratory relief based on their argument that the first amendment required that evidence in a newspaper's possession be obtained by a subpoena duces tecum rather than by a search warrant unless police make a clear showing that the evidence would otherwise be destroyed. The Court, after admitting that first amendment values were implicated, in effect dismissed any notion that the first amendment provided additional protection beyond that accorded by the fourth amendment in such circumstances:

> Neither the Fourth Amendment nor the cases requiring consideration of First Amendment values in issuing search warrants, however, call for imposing the regime ordered by the District Court. Aware of the long struggle between Crown and press and desiring to curb unjustified official intrusions, the Framers took the

> enormously important step of subjecting searches to the test of reasonableness and to the general rule requiring search warrants issued by neutral magistrates. They nevertheless did not forbid warrants where the press was involved, did not require special showings that subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated. Further, the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search. As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. Properly administered, the preconditions for a warrant--probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness--should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices. Id. at 565.

As further support for his conclusion, Judge Wilkey cites several cases dealing with mail covers, the use of informants and physical surveillance, all of which tend to indicate by way of implication

that a good faith criminal investigation which does not tread on fourth amendment rights does not violate the first amendment. See Slip Op. at 49-53.

In support of their contention that the first and fourth amendments are co-extensive in the context of a legitimate investigation, the defendants also rely on Sinclair v. Kleindienst, No. 610-73 (D.D.C. Sept. 23, 1977), where the plaintiff challenged warrantless electronic surveillance of his telephone communications as authorized by the Attorney General. In addition to the alleged violations of their fourth amendment rights, the plaintiffs also alleged violations of the first, ninth and fifth amendments. Although the Court held that these alleged violations would be relevant to the issue of damages, it concluded that they did not provide an independent basis for recovery:

> These allegations are necessarily intertwined with the reasonableness of the wiretaps and the good faith belief of the defendants in the legality of their conduct, issues which were raised in the first cause of action and which remain in the case. Therefore, these causes of action must succeed or fail as the first cause of action succeeds or fails. To the extent they are not independent bases for recovery, they are dismissed. These issues remain in the case, however, for if plaintiffs prove the wiretaps were unreasonable and the defendants acted in bad faith, they will be permitted to show any chill on their first amendment rights, invasion of their privacy, or their subjection to a bad faith prosecution in order to determine the measure of damages to which they would be entitled.
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> Slip Op. at 11.

The Court is convinced that the analysis of Judge Wilkey and that followed by the Court in Sinclair is correct insofar as it sets forth the legal principle that the first amendment and the fourth amendment provide coextensive zones of privacy in the context of a good faith criminal investigation. Furthermore, the Court believes that this principle applies with equal force to good faith national

security investigations which are not strictly criminal in nature. Any holding otherwise would clearly place an insurmountable burden on any good faith investigation. Almost any investigation, no matter how nonintrusive, will implicate some first amendment rights. Physical surveillance, the use of informers and discussions with other persons about the subject will necessarily reveal some of the subject's associations, beliefs, expressions and communications of all kinds. To tailor investigations so as to avoid implicating a subject's first amendment activites would be impossible. This is especially true when one considers the varied and common forms of speech which receive first amendment protection.

The Court is unpersuaded by the plaintiff's argument that the principle of coextensive first and fourth amendment protection in the context of a good faith

investigation is refuted by a number of cases which have upheld the justiciability of first amendment claims without a discussion of relevant fourth amendment principles. Aside from the fact that the issue now before the Court is different from those decided in the cases relied on by the plaintiff, the Court is of the opinion that these cases for the most part support, rather than refute, the proposition that in the context of a good faith investigation, the privacy protections guaranteed by the first and fourth amendments are coextensive.

Nearly all of the cases relied on by Jabara mention an allegedly illegitimate investigatory motive or illegitimate investigatory practices as part of the basis for their decision. For example, in Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate, 519 F.2d 1335, 1338-39 (3rd Cir. 1975), the

Court stated:

> It is not apparent how making information concerning the lawful activities of plaintiffs available to non-police groups or individuals could be considered within the proper ambit of law enforcement activity. . . . We think plaintiffs' allegations of specific identification of most of the plaintiffs in the television broadcast when joined with the absence of a lawful purpose, make an adequate showing for pleading purposes of an invasion of plaintiffs' rights to associational privacy and freedom of speech (emphasis supplied).

And in Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144, 151 (D.D.C. 1976), the Court stated:

> This Court agrees that actions beyond "legitimate surveillance activities" are a proper subject of challenge. Thus, while collection and retention of information, if collected in a legal manner, cannot be challenged, public dissemination of that information in a false or defamatory manner and with no lawful purpose, disruption of legitimate activities, termination of employment, illegal electronic surveillance, and other forms of harassment are subject to challenge as beyond "legitimate surveillance activities." Moreover, even legitimate surveillance activities, if undertaken in conjunction with illegitimate activiites in a manner which raises the inference

> that the motive was intimidation or coercion, would be subject to challenge.

See also Handshu v. Special Services Division, 349 F.Supp. 766, 771 (S.D. N.Y. 1972). ("A hearing may establish that some of the alleged informer and infiltration activities are unrelated to legitimate law enforcement functions.") Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326, 332 (2nd Cir. 1973) ("Beyond any reasonable doubt that FBI had a legitimate interest in and responsibility for the maintenance of public safety and order. . .")[6]

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6 Other cases relied on by Jabara, although not referring to illegitimate conduct specifically, clearly involved allegations of police activity outside the scope of legitimate investigatory tactics. See American Civil Liberties U. v. City of Chicago, 431 F.Supp. 25 (1976) (physical attacks and disruption of sources of financial support); Alliance to End Repression v. Rochford, 407 F.Supp. 115 (N.D. Ill. 1975) (incitement to commit unlawful acts, warrantless electronic surveillance, illegal search and seizure, and summary punishment and harassment); Philadelphia

The only case to suggest a contrary result is Paton v. LaPrade, No. 1091-73 (D. N.J. November 29, 1978), where the plaintiff alleged a first amendment violation when the return address of her letter to the Socialist Workers Party was recorded by the FBI, pursuant to a mail cover placed on the addressee. The plaintiff had intended to direct this letter to the Socialist Labor Party as part of an assignment for a high school social studies course. Although the Court found that the plaintiff's fourth amendment rights were not violated by the mail cover, the Court held that the postal regulation authorizing mail covers for national security purposes was so vague and overbroad that it violated the first amendment.

Resistance v. Mitchell, 58 F.R.D. 139 (E.D. Pa. 1972) (physical violence, threats, illegal searches and seizures, illegal electronic surveillance and denial of the right to counsel).

Although on the surface Paton appears to stand for the proposition that the first amendment gives one a greater protection from good faith investigatory practices than the fourth amendment, a closer examination discloses that the decision in Paton was a narrow one and that it, in fact, supports the proposition previously adopted by this Court. In essence, the Court in Paton held that the term "national security" as used in the Postal Regulation was so vague and overbroad that to sanction mail covers in its name would lead to abuses and would, in fact, permit mail covers to be employed by public officials "to pursue their personal predilections." Thus, the Court did not find that a mail cover which was imposed because of legitimate national security concerns was invalid. Rather, it found a regulation permitting both legitimate and illegitimate mail covers to be unconstitutional.

There is no indication that the Paton court, if faced with a decision not involving the constitutionality of a statute or regulation would have held that the zone of privacy guaranteed by the first amendment exceeds that provided by the fourth amendment in an objectively legitimate national security investigation. In fact, the Court specifically recognized that mail covers were legitimate in the context of a valid criminal investigation. Thus, it is clear to this Court that Paton did not question the proposition that first amendment privacy rights must yield in the face of a good faith investigation; instead, it held that a statute which did not distinguish between legitimate and illegitimate national security investigations was invalid.

It is clear from the above that the crucial issue with respect to investigatory practices under consideration in this

section of the opinion is whether the FBI's investigatory conduct can be termed a good faith national security investigation.[7] From the evidence presented both in the public record and in the in camera affidavits, the Court concludes that genuine issues of material fact exist with respect to this issue, and that the summary judgment motions of both the plaintiff and defendants must be denied. In its earlier opinions in this case the Court has alluded to the merits of the investigation. For example, a 1974 opinion concerning discovery matters stated "the court is of the opinion that the investigation which the

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7 The Court will not at this time attempt a precise definition of this term. However, in the Court's opinion, a "good faith national security investigation" suggests more than a subjective perception of a threat to the national security--it suggests an investigation which is in response to a demonstrable threat to the nation or its citizens and which is calculated to deal with or provide information regarding that threat.

defendants admit they were[8] conducting was conducted pursuant to legitimate governmental concerns." Jabara v. Kelley, 62 F.R.D. 424, 431 (E.D. Mich. 1974). However, in a 1977 opinion, again regarding discovery matters, the Court stated that "its in camera review has not revealed any evidence to establish that the plaintiff or the domestic organization to which he belongs has been implicated in any way with a foreign agent or organization of or acting in collaboration with a foreign power." Jabara v. Kelley, 75 F.R.D. 475, 493 (E.D. Mich. 1977). These passages do not reflect inconsistent findings but merely indicate the varying inferences which can be drawn both from the in camera submissions and the public record in the

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8 In view of the defendants' admission that the investigation continued until at least December, 1975, the use of the past tense appears to have been inappropriate.

case. On the one hand, the in camera affidavits tend to indicate that a generalized and legitimate government concern provided the impetus for the investigation. On the other hand, the length of the investigation, its seeming preoccupation with Jabara's political views, the fact that in many instances Jabara was encouraging other Arabs to mount legal challenges to FBI investigations and the failure of the investigation to uncover any concrete evidence that Jabara's activities implicated national security along with other factors tend to indicate that the investigation was not wholly prompted by legitimate or good faith national security concerns. As a result, the Court is of the opinion that it can grant neither Jabara's nor the defendants' motion for summary judgment with respect to the plaintiff's first amendment claim on the basis of the record as it now stands.

The Court realizes that this decision places the future course of this litigation in some doubt. It may well be that a public trial on the nature of the FBI's investigation will be impossible because of national security considerations. However, the Court cannot take such considerations into account when deciding a motion for summary judgment. The Court is bound to grant such relief only when no genuine issue of material fact exists. Given the nature of the record in this case, the Court must conclude that a genuine issue regarding the motives and legitimacy of the Jabara investigation exists, the resolution of which requires a fact finder.

(c) The Sixth Amendment Claim

As part of his fourth cause of action, the plaintiff alleges that the sixth amendment rights of his clients were violated by the interception of telephone communications between himself and said clients.

The Court is of the opinion that this portion of Jabara's complaint must be dismissed pursuant to F.R.C.P. 12(b)(6) because it fails to state a claim upon which relief can be granted. Manifestly, the rights guaranteed by the sixth amendment are those of the client and not the attorney. Therefore, assuming that a sixth amendment violation can be asserted on the facts of this case,[9] only the client has standing to assert a violation of his sixth amendment rights. In this case, Jabara, even as an attorney, lacks sufficient standing to assert violations of his clients' rights to counsel as a personal cause of action. For this reason, the plaintiff's sixth amendment claim must be dismissed.

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9 The decision in Moro v. Telemundo Incorporado, 387 F.Supp. 920 (D. Puerto Rico 1974), casts doubt on the validity of such an assumption.

V. ELECTRONIC SURVEILLANCE BY THE FBI

The defendants have also moved for a summary judgment with respect to the plaintiff's constitutional and statutory claims arising out of the FBI's incidental interception of Jabara's conversations with individuals who were the target of FBI wiretaps.[10] The plaintiff's complaint alleges that this conduct violated the fourth amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. The Court is of the opinion that the defendants' motion is to be granted with respect to these claims.

First, it is clear that the plaintiff's theory of recovery cannot be based on the provisions of Title III.

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10 The plaintiff had admitted in his brief in support of his motion for summary judgment that the record does not support a finding of prima facie illegal electronic surveillance.

Although Title III requires a warrant for certain types of electronic surveillance, it did not legislate with respect to the President's power to authorize electronic surveillance with respect to matters of national security. 18 U.S.C. § 2511(3). In United States v. United States Court (Keith), 407 U.S. 297 (1972), the Supreme Court held that clear language of Title III reveals that it did not legislate with respect to national security surveillances and that such surveillances therefore are not subject to the warrant requirements contained in 18 U.S.C. § 2518. Accord, Halliman v. Mitchell, 418 F.Supp. 1056 (N.D. Cal. 1976). However, in Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), (en banc), a plurality of the Court held that Title III was applicable to any situation where a warrant was constitutionally required for electronic surveillance. In other words, the Court

recognized that while Title III does not legislate with respect to the necessity of obtaining a warrant for national security wiretaps, it does provide procedures and remedies applicable to any national security wiretap where a warrant is otherwise required by the Constitution.

Thus, even considering Zweibon, it is clear that Title III does not in and of itself require a warrant for national security investigations. As a result, the issue which must be resolved is whether there is a constitutional basis, aside from Title III, which requires a warrant for electronic surveillance such as that conducted in this case. In Keith, the Court held that a warrant was constitutionally required for domestic national security wiretaps. However, the Court specifically left open the issue of whether a warrant is required for a foreign national security wiretap:

> As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed and express no opinion as to the issues which may be involved with respect to the activities of foreign powers or their agents. 407 U.S. at 321-22.

Courts considering the question left open in Keith have almost unanimously held that a warrant is not required for a foreign national security surveillance:

> [B]ecause of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, we reaffirm what we held in United States v. Clay, [430 F.2d 165 (5th Cir. 1970), rev'd on other grounds 403 U.S. 698 (1970)], that the President may constitutionally authorize warrantless wiretaps for the purposes of gathering foreign intelligence. United States v. Brown 484 F.2d 418, 426 (5th Cir. 1973).

Accord, United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974) (en banc), cert. denied, 419 U.S. 881 (1974); United States v. Smith, 321 F.Supp. 424 (C.D.Cal. 1971); United States v. Humphrey, 456 F.Supp. 51 (E.D. Va. 19780.

The only case questioning this proposition is Zweibon v. Mitchell, supra, involving electronic surveillance of the Jewish Defense League. The Zweibon plurality voiced its disapproval of the decisions in Brown and Butenko and expressed a belief that a warrant is required for both domestic and foreign national security electronic surveillances. Despite this, the plurality opinion did not go so far as to hold that a warrant was required for all foreign intelligence surveillances:

> the President's authority with respect to the conduct of foreign affairs does not excuse him from seeking judicial approval before instituting a surveillance, at least where the subject of the surveillance is a domestic organization that is not the agent of or acting in collaboration with a foreign power. Id. at 655.

In light of these decisions, the Court is of the opinion that a warrant is not required for foreign intelligence elec-

tronic surveillance authorized by the President where the target of the surveillance is an agent of or acting in collaboration with a foreign power.

Applying this holding to the instant case, the Court concludes that a warrant was not required for the FBI wiretaps in question. In an earlier opinion, the Court found that the subjects of these surveillances were associated with a foreign-based international terrorist movement. Jabara v. Kelley, 75 F.R.D. at 489. In addition, the Court has carefully reviewed the in camera affidavit of FBI Special Agent Robert F. Peterson regarding the targets of the FBI wiretaps at issue. Based on the facts set forth in this affidavit, it would be impossible to conclude that the surveillance in question was not primarily for foreign intelligence purposes. Nor would it be possible to conclude that the subjects of these sur-

veillances were not agents or collaborators of a foreign power. Therefore, on the authority of the above cited cases, the Court holds that prior judicial approval in the form of a warrant was not required for the surveillances in question. In addition, the Court's finding that the wiretaps in question were primarily for foreign intelligence purposes forecloses any possibility of a post-interception judicial finding that the electronic surveillances in question were unreasonable. United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974). Accordingly, the Court grants the defendants' motion for summary judgment with respect to those claims concerning the reasonableness of the FBI's interceptions as well as those claims based on the failure to procure a warrant for such interceptions.

VI NSA SURVEILLANCE

During the course of its investiga-

tion of Jabara, the FBI requested the National Security Agency to supply any available information regarding the plaintiff that might come into its possession. Pursuant to this request, summaries of Jabara's electronically intercepted communications were forwarded by NSA to the FBI. Two of these communications were used as leads and the FBI disclosed their contents outside the Bureau in order to identify and obtain a document referred to in one of the communications and to confirm Jabara's travel plans as discussed in another communication.

Based on this record, the plaintiff maintains that he is entitled to declaratory and injunctive relief with respect to these warrantless electronic surveillances because they violate his constitutional and statutory rights. The defendants, on the other hand, have moved

for dismissal of this cause of action for want of proof, arguing that the evidence required to litigate this issue is covered by the state secrets privilege. This contention is based on the fact that the Court has upheld claims of privilege with respect to the method of interception employed by NSA and the contents of the communications intercepted.

Before reaching the merits of these contentions, it is important to distinguish the NSA intercepts from the incidental interceptions by the FBI discussed earlier. First, while it is not clear that Jabara was the target of the NSA interceptions, it is apparent that the FBI specifically requested summaries of Jabara's foreign communications. Thus, at least with respect to the examination and disclosure of these summaries, the conduct of NSA and the FBI was not incidental to the investigation of nonparties. Second, while the

Court cannot say with any certainty whether the interceptions in question were conducted pursuant to the investigation of an agent or collaborator of a foreign power, there is no evidence that Jabara's communications were targeted by the FBI for examination because of the identity of the other party. In other words, while the impetus for the interceptions in question remains unclear, the record, including the in camera affidavits, does not disclose any reason for the targeting and examination of these communications other than the facts that Jabara was a party to them.

The primary issue, therefore, is whether this factual background establishes a case of illegal electronic surveillance or whether the claim must be dismissed because its proof would involve the disclosure of information guarded by the state secrets privilege. In support of their

position that the claim must be dismissed, the defendants rely on Halkin v. Helms, No. 75-1773 (D.D.C. June 30, 1977) aff'd in part and rev'd in part, No. 77-1922 (D.C. Cir. June 16, 1978), where the plaintiffs sought relief for allegedly unlawful electronic surveillance activities conducted by NSA. In response to NSA's motion, the District Court dismissed the complaint of Halkin et al. with respect to certain interceptions holding that national security considerations precluded disclosure of whether the alleged interceptions had in fact taken place. With respect to certain other alleged interceptions, the Court held that the national security would not be compromised by requiring NSA to disclose whether or not these interceptions occurred.

On appeal, the Circuit Court of Appeals for the District of Columbia affirmed the District Court's dismissal

with respect to the first group of interceptions. The Court of Appeals reversed with respect to the second group of alleged interceptions, holding that even disclosure of the fact of interception would jeopardize the national security. See also Totten v. United States, 92 U.S. 105 (1875); Kinoy v. Mitchell, 67 F.R.D. 1 (S.D. N.Y. 1975).

Although the Court agrees with the general proposition that an action should be dismissed if its proof would disclose state secrets, this case is clearly different from Halkin. In Halkin the District Court dismissed certain allegations "because the threshold and ultimate issue--the fact of interception--cannot be admitted or denied." Slip Op. at 5. In this case, that threshold and ultimate issue is an admitted fact. There is no question that summaries of several of the plaintiff's conversations were obtained

by the FBI from NSA. This, the plaintiff argues, entitles him to the relief sought because there was no prior judicial approval.

The Court is of the opinion that resort need not be made to privileged material to establish a violation of the plaintiff's constitutional rights and that the plaintiff is entitled to a judgment with respect to the defendants' liability as to this issue. The defendants' contention that the technique used to intercept Jabara's communications somehow poses questions of whether the fourth amendment is applicable has no merit whatsoever. Long ago the Supreme Court recognized that "the Fourth Amendment protects people not places" and that the method of intrusion has no bearing on the protection afforded by that amendment[11] when the

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11 "[O]nce it is recognized that the Fourth Amendment protects people--and not

intrusion is made into an area where there is a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347 (1967). In light of Katz, the Court cannot give credence to the defendants' assertion that "the methodology described by paragraph 5(b) [of the in camera affidavit of Secretary of Defense Harold Brown] alone suggests on its face. . . that the very applicability of the Fourth Amendment is arguably not at issue." Defendants' Brief at 22.

From the Court's review of Secretary Brown's affidavit, it is apparent that the fact that Jabara's communications were

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simply 'areas'--against unreasonable searches and seizures, it becomes clear that the reach of that amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. . . . The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." Katz v. United States, 389 U.S. 347, 353 (1967).

intercepted in the ways described without more may present a question of whether his privacy has been violated. In this case, however, not only is interception an admitted fact, but it is also admitted that Jabara's intercepted communications were targeted for transmission to and examination by the FBI. Based upon these admissions, it is impossible for the Court to conclude that the fourth amendment has not been violated.

The defendants do not and could not contend that Jabara has no reasonable expectation of privacy in his foreign communications. In addition, the defendants cannot rationally argue that the interception of these communications, when coupled with the transmission of summaries of their contents, did not violate this privacy. Thus, the only question which must be resolved is whether the procedure is immune from the warrant

requirement.

In their brief the defendants argue that:

> Plaintiff's presumption that communications to which he was a party were not acquired as a result of surveillance on an agent of a foreign power is totally unsupported by the record. Communications have both a sender and a recipient. Plaintiff apparently overlooks the possibility that the party to his communication, or some other aspect of its content, may have been the actual object of surveillance and not the plaintiff himself.
>
> Defendants' Brief at 22.

If, in fact, the object of the surveillance in question was an agent or collaborator of a foreign power, it is arguable that a warrant would not have been required for interception. See Part V, supra. Despite this, the defendants' argument overlooks the fact that the FBI requested NSA to supply the Bureau with any information about Jabara which came into NSA's possession in the course of its foreign intelligence activities. Thus,

while the impetus for intercepting the communications in question may not have been Jabara's activities, Jabara clearly was the target of this intelligence activity insofar as it was the FBI's request which caused Jabara's communications to be targeted for transmission to and examination by the Bureau. This, the Court believes, is a clear violation of Jabara's fourth amendment rights regardless of whether he or an agent or collaborator of a foreign power was the target of the surveillance.[12] Therefore, the Court is of the opinion that the defendants have failed to produce and could not produce any evidence which would establish that the transmission and examination of

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12 There is nothing in the record to suggest that any impetus for the transmission and subsequent examination of these summaries existed other than the fact that Jabara was a participant in the communications.

Jabara's communications was subject to the foreign agent or collaborator exception to the warrant requirement.

Furthermore, any contention that a warrantless search directed at Jabara can be justified by the plaintiff's affiliations must fail in light of the Court's earlier finding "that its in camera review [of materials submitted by the government] has not revealed any evidence to establish that the plaintiff or the domestic organization to which he belongs has been implicated in any way with a foreign agent or organization or acting in collaboration with a foreign power." Jabara v. Kelley, 75 F.R.D. at 493.

Thus, it is clear to the Court that a fourth amendment violation has occurred. As noted above, the mode of interception employed by NSA does involve serious fourth amendment questions with respect to whether NSA surveillance alone violates a

person's reasonable expectations of privacy and is subject to the warrant requirement of the fourth amendment. However, the examination of the contents of conversations thus intercepted would violate a persons' reasonable expectation of privacy[13] and is tantamount to what has generally been referred to as an interception in cases and statutes dealing with more traditional modes of electronic surveillance. Consequently, absent some recognized exception to the warrant requirement, the targeting of a person's conversations intercepted by NSA for summarization, transmission to, and subsequent examination by other agencies must be done pursuant to prior judicial authorization akin to a warrant. Here no such

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13 This is expecially true in this case where at least two of the communications in question were used for investigative lead purposes by the FBI.

exception exists. Jabara has not been shown to be an agent or collaborator of a foreign power and even if it were shown that such an agent or collaborator was the other party to Jabara's intercepted communications, that circumstance would be irrelevant to the warrant requirement. Since the FBI's interest in Jabara led to the transmission and examination of the summaries in question, any applicable exception to the warrant requirement must be based on Jabara's status or identity.

Accordingly, the plaintiff's motion for summary judgment with respect to this issue is granted. In view of the fact that Title III remedies apply to any interception requiring a warrant, see Zweibon, supra, the Court need not decide whether Title III was in fact violated in view of its holding that the Constitution

requires a warrant in these circumstances.[14]

VII THE PRIVACY ACT

The plaintiff's eighth cause of action alleges that the defendants have violated certain provisions of the Privacy Act, 5 U.S.C. §§ 552a(e)(1) and (7), by maintaining records regarding how Jabara exercises his first amendment rights.[15] As a remedy for these alleged violations, Jabara asks the Court to order the destruction of "all records or other

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14 From the in camera affidavits it appears that Title III would not provide a separate ground for requiring a warrant in this case in view of the Supreme Court's holding in Keith that national security surveillance conducted pursuant to executive order is not within the ambit of Title III.

15 In his brief, Jabara alleges that the defendants have violated other sections of the Privacy Act, to wit: 5 U.S.C. § 552a (c)(6), regarding transfer of information, and 5 U.S.C. § 552a(b) regarding the accuracy of records. Since neither of these allegations are set forth in the complaint, the Court will not consider them on this motion.

materials of any kind maintained by them concerning the constituionality [sic] protected activities of the plaintiff." Plaintiff's Second Amended Complaint at 4.

First, the Court is of the opinion that the plaintiff has alleged sufficient harm to maintain an action for relief under the Privacy Act. Section 552a(g)(1) provides in part:

> Whenever any agency. . . fails to comply with any other provisions of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual. . . the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

The breadth of this grant of jurisdictional authority is evident from the Senate Report accompanying an earlier version of the Privacy Act:

> . . .The grant of a cause of action to any "aggrieved person" is designed to encourage the widest possible

> citizen enforcement through the judicial process. This is necessary, as mentioned, since the Act does not give any administrative body authority to ensure compliance with the Act. The Committee intends the use of the term "aggrieved person" to afford the widest possible standing consistent with the constitutional requirement of "case or controversy" in Article III, Sec. 2 of the Constitution. In this respect, the provision is designed, among other things, to supply certain deficiencies in standing and ripeness which the courts found in the Environmental Protection Agency v. Mink, 410 U.S. 73 (1973), Laird v. Tatum, 408 U.S. 1 (1972) and Stark v. Shultz, 416 U.S. 21 (1974). 1974 U.S. Code Cong. & Admin. News 6997.

In view of the plaintiff's aforementioned allegations of harm, including his allegations regarding the falsity of data contained in the FBI files, the Court concludes that he has alleged sufficient harm to permit him to maintain this action under the Privacy Act.

Turning to the merits of Jabara's Privacy Act claims, Section 552a(e)(1) provides that an agency may:

> maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.

In view of the fact that the violation alleged in the plaintiff's eighth cause of action appears to relate only to § 552a(e)(7) and since the plaintiff's brief fails to mention § 552a(e)(1) as a ground for recovery, the Court is of the opinion that the alleged violation of § 552a(e)(7) is the only Privacy Act allegation properly before the Court and that the §552a(e)(1) claim is to be dismissed.

With respect to the alleged violation of § 552a(e)(7) the Court is of the opinion that there is no genuine issue of material fact and that Jabara is entitled to judgment on his claim that the defendants' maintenance of records violates that provision of the Privacy Act.

Section 552a(e)(7) provides that an agency shall:

> Maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

It is undisputed that the defendant FBI has made, maintained and transmitted records regarding Jabara's expression of his political views in public and private speeches. Although the defendants do not contend there is a specific statute authorizing them to maintain such records, they do content that the maintenance of such records is "pertinent to and within the socpe of an authorized law enforcement activity."

Unfortunately, the term "authorized law enforcement activity" is not defined in the Privacy Act. There are, however, portions of the legislative history of

the Act which shed some light on the scope of this term. The original Senate Bill upon which the Privacy Act was based contained various exceptions for records which were referred to as "investigative information" and "law enforcement intelligence information." As used in the original bill, these terms were defined as follows:

> The term "investigative information" has a special and narrow meaning under this bill. It has been discussed at length in the section of the report entitled, "Law Enforcement Files". It means information associated with an identifiable individual compiled by--
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> > (1) an agency in the course of conducting a criminal investigation of a specific criminal act where such investigation is pursuant to a statutory function of the agency. Such information may pertain to that criminal act and be derived from reports of informants and investigators, or from any type of surveillance. The term does not include criminal history information nor does it include initial reports filed by a law enforcement agency describing a specific

> incident, indexed chronologically and expressly required by State or Federal statute to be made public; and
>
> . . .
>
> The term "law enforcement intelligence information" means information associated with an identifiable individual compiled by a law enforcement agency in the course of conducting an investigation of an individual in anticipation that he may commit a specific criminal act, including information derived from reports of informants, investigators, or from any type of surveillance. The term does not include criminal history information nor does it include initial reports filed by a law enforcement agency describing a specific incident, indexed chronologically by incident and expressly required by State or Federal statute to be made public.

Given this definition, it is difficult to conclude that the self-contained exemption in § 552a(e)(7) relating to law enforcement activity applies to any records which do not relate to specific past, present or future criminal acts. Merely because the FBI may act within its authority by monitoring the public or

private speeches of a person i . the course of a legitimate security investigation does not give it the right to maintain records relating to the contents of these speeches where the investigation does not focus on a past or anticipated specific criminal act.

The defendants appear to recognize this fact when they argue:

> In this respect, each of the investigative activities described in paragraph 2 of the in camera Williamson affidavit was undertaken pursuant to the suspected violation of a particular federal statute [e.g., para. 2(a)], or in aid of a bona fide security investigation to prevent the violation of a federal statute. Defendants' Brief at 20.

Upon review of the Williamson affidavit, the Court is of the opinion that it cannot sustain the defendants' position. While the affidavit does reveal one particular instance where the investigation of a suspected violation by someone other than Jabara did lead to an investi-

gation of Jabara, this investigation appears to have been of a limited nature. Furthermore, the Court cannot see how the records maintained regarding Jabara's political views as expressed in his speeches and discussions has any relevancy to the one criminal violation set forth in the Williamson affidavit.

Other than this one instance, the Court finds nothing in the Williamson affidavit to support a finding that the FBI investigation of Jabara was in response to any suspicion that he was involved in any past specific crime or that he would commit any specific future crime. Accordingly, the Court grants the plaintiff's motion for summary judgment with respect to the defendants' liability for the alleged violation of § 552a(e)(7).

Given the plaintiff's request to submit further memoranda on the issue of relief, the Court will not rule on the

issue of whether file destruction is the appropriate remedy for this violation. Instead, the Court orders that the parties file memoranda and such other documents as will be relevant to a determination of the appropriate remedy for this violation.[16]

VIII AUTHORITY OF THE FBI

As his eighth cause of action the plaintiff seeks relief based on an allegation that the FBI and the individual defendants lack the authority to conduct

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16 In view of this, the Court is of the opinion that a decision on the plaintiff's contention that file destruction is warranted not only by the Privacy Act but also as an exercise of the Court's general equity powers is not required at this time. First, in view of the fact that a factual dispute exists with respect to the legitimacy and good faith nature of the FBI's investigation, it is not apparent that file destruction should be undertaken as a general equitable remedy. Second, the equitable remedy requested in Jabara's complaint is the same as that requested pursuant to the Privacy Act. Therefore, if file destruction is ordered under the Privacy Act, the question of whether file destruction is available as a general equitable remedy will be moot.

the type of investigation set forth in the complaint. Jabara characterizes the defendant's conduct as a "noncriminal domestic security" investigation. He argues that neither presidential directives nor statutes confer upon the FBI the authority to conduct such an investigation.

The defendants assert that their conduct falls within the express authority of the Attorney General set forth in 28 U.S.C. § 533:

> The Attorney General may appoint officials. . . (3) to conduct other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.

The defendants also rely on 28 C.F.R. § 0.85(d), promulgated pursuant to this statute by the Attorney General. This regulation directs the FBI to "take charge of the investigative work in matters relating to espionage, sabotage, subversive activities, and related matters."

The Court is of the opinion that this issue cannot be resolved on a motion such as this. The question of whether the FBI's actions in the Jabara investigation were ultra vires depends not only upon the lack of an actual connection between Jabara and any potential threat to the national security; it also depends upon the reasonable suspicions of the FBI gathered from existing evidence.[17] Given the Court's earlier discussion regarding the factual issues surrounding the legitimacy and purpose of the FBI investigation of Jabara, the Court concludes that genuine issues of material fact exist with respect to whether the investigation of

17 The Court rejects Jabara's contention that the statute, regulations and Presidential directives applicable to FBI authority limit the FBI to the investigation of present and future criminal acts. Without expressing any opinion with respect to purely internal matters, the Court is of the opinion that the FBI's investigative authority extends to authorized national security investigations involving foreign influences.

Jabara falls within the ambit of FBI authority. Consequently, the parties' respective motions for summary judgment on this issue are denied.

IX CONCLUSION

For the reasons stated above, the Court grants in part and denies in part the defendants' motion to dismiss and for summary judgment. Similarly, the Court grants in part and denies in part the plaintiff's motion for summary judgment. The parties will be directed to supply the Court with further memoranda regarding the future course of this litigation and the declaratory, injunctive and monetary relief due the plaintiff on a date to be set by the Court.

An appropriate order shall be submitted.

RALPH M. FREEMAN
United States District Judge

Dated: June 13, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ABDEEN M. JABARA,

Plaintiff,

v. Civil No. 39065

CLARENCE M. KELLEY, ET AL.,

Defendants.

Filed March 11, 1980

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

This matter having come on before this Court by Motion of Defendant and the Plaintiff having responded thereto and the Court, upon a thorough review of the arguments raised in Defendant's Motion and supporting Affidavits, the record in this cause, the Reply Memorandum of Plaintiff and further being fully advised in the premises;

NOW, THEREFORE, IT IS ORDERED THAT Defendant's Motion for Reconsideration be, and the same is hereby, DENIED.

RALPH M. FREEMAN
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ABDEEN M. JABARA,

Plaintiff,

v.

WILLIAM WEBSTER, et al.,

Defendants.

Civil Action No. 39065

PARTIAL JUDGMENT

This matter came before the Court on the Motion of Plaintiff for Summary Judgment and the Motion of the Defendants to Dismiss and Summary Judgment pursuant to Rules 12(b)(6) and 56, Federal Rules of Civil Procedure, after the issuance by this Court of three Memorandum Opinions relating to Plaintiff's discovery of the facts.

After submission of memoranda in support of the respective motions and oral

arguments having been heard, and after the Court's consideration of the entire public and in camera record in this case and the issuance of a Memorandum Opinion on June 13, 1979, concerning certain of the dispositive issues and merits of this cause,

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED:

1. Defendants' motion to dismiss for mootnes and for lack of justiciability is denied.

2. Plaintiff's Fourth Cause of Action is dismissed.

3. Plaintiff's Third Cause of Action as to the claim of Fourth Amendment violations of Plaintiff's rights is dismissed. The First Amendment claim of Plaintiff's Second and Third Causes of Action presents genuine issues of material fact and, therefore, will be upheld pending further proceedings thereon in this Cause.

4. Defendants' Motion to Dismiss Plaintiff's First Cause of Action is hereby granted as to electronic surveillance conducted by Defendant Federal Bureau of Investigation.

5. Plaintiff's Motion for Summary Judgment on the First Cause of Action is hereby granted against the officially-sued defendants regarding the summarization, transmission to, and subsequent examination of Defendant Federal Bureau of Investigation of Plaintiff's communications intercepted by Defendant National Security Agency.

IT IS FURTHER ORDERED that the Director of the National Security Agency is enjoined from using plaintiff's name or other personal identifier as a means for selecting foreign cable communications for analysis, summary, examination or dissemination without first obtaining a judicial warrant pursuant to procedures

provided for by applicable law. All remaining defendants not employed by the National Security Agency are enjoined from requesting the National Security Agency to use plaintiff's name or other personal identifier as a means for selecting copies of plaintiff's foreign communications or communications to plaintiff from a foreign origin for analysis, review, summary or dissemination without first obtaining a judicial warrant pursuant to procedures provided by applicable law.

6. Defendants' Motion to Dismiss Plaintiff's Fifth Cause of Action is hereby granted as to all conduct alleged to be in violation of Plaintiff's Fourth, Fifth and Ninth Amendment rights, except that pertaining to the selection, review, summary and dissemination of plaintiff's foreign communications by the National Security Agency. Defendants' Motion to

Dismiss that part of the Cause pertaining to alleged violations of plaintiff's First Amendment rights is denied pending further proceedings thereon.

7. Defendants' Motion to Dismiss Plaintiff's Sixth Cause of Action is granted.

8. The parties' respective Motions to Dismiss or for Summary Judgment on Plaintiff's Seventh Cause of Action are hereby denied, and the Court concludes that genuine issues of material fact exist with respect to whether Defendants' investigation of Plaintiff falls within the ambit of FBI authority.

9. Plaintiff's Motion for Summary Judgment on the Eighth Cause of Action is granted as to record maintenance and dissemination governed by 5 U.S.C. § 552a (e)(1). It is ordered that Defendants and their successors in office are enjoined from recording, maintaining,

using or disseminating information about the Plaintiff's political beliefs, communications, speeches, writings, associations or activities, both public or private, which do not relate to specificate criminal acts.

10. The Court will retain jurisdiction of this action pending disposition of all matters in this cause not resolved in this Decree and for the purpose of issuing any additional order required to effectuate this Decree.

RALPH M. FREEMAN
United States District Judge

Dated: April 4, 1980.

No. 80-1391

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ABDEEN M. JABARA,
Plaintiff-Appellee,

v.

WILLIAM H. WEBSTER, ET AL.,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed October 21, 1982

Before: MARTIN, Circuit Judge; PECK and BROWN,* Senior Circuit Judges.

BAILEY BROWN, J. Appellee, Abdeen M. Jabara (Jabara), a Detroit lawyer of Arab extraction, has over the years been interested and active in Arab causes. The Federal Bureau of Investigation (FBI), as a result of his activities, began an investigation of him in 1967. This investigation was not continuous and varied from time to time as to intensity and as to the technique used. The technique used by the FBI included physical surveillance by agents and informants, including his speech-making activities, inspection of Jabara's bank records, warrantless electronic surveillance by the National Security Agency (NSA), and interviews of third parties regarding Jabara. This information was maintained and disseminated by the FBI.

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* Circuit Judge Brown retired from regular active service under the provisions of 28 U.S.C. § 371(b) on June 16, 1982, and became a Senior Circuit Judge.

Jabara filed an action in district court in Detroit in October, 1972, alleging several causes of action. The defendants include the Attorney General, the Directors of the FBI and NSA in their official capacities and certain known and unknown officers and employees of the FBI and the NSA. One cause of action alleged was that Jabara's fourth amendment rights were violated as a result of NSA's interception of his "communications by means of warrantless electronic surveillance and/or disclosed summaries of these interceptions to the Federal Bureau of Investigation."[1] Another cause of action alleged was that the defendants violated a provision of the Privacy Act, 5 U.S.C. § 552a(e)(7), by maintaining records with respect to Jabara's exercise of his first amendment rights. The district judge, on cross-motions for summary judgment, granted judgment and injunctive relief to Jabara as to both of these claims and defendants appealed.[2]

I.

A preliminary question presented on this appeal is whether this court can, as contended by defendants, properly consider *in camera* the classified appendix that defendants filed in the district court.[3] Jabara's position is that this court should not consider the materials in the classified appendix at all unless the materials are made available to him or at least to his counsel subject to a protective order. The district court determined (75 F.R.D. 475, 487 (1977)) that these materials, because they are properly protected by the state secret privilege, should be submitted *in camera;* this was done without

[1] Second amended complaint. (App. at 69).

[2] The history of this litigation, including citations to reported opinions dealing with resolution of discovery issues, is clearly and fully set out in the opinion of the district court resulting in the grant of summary judgment and injunctive relief. *Jabara* v. *Kelley,* 476 F. Supp. 561 (E.D. Mich. 1979).

[3] *In camera* treatment and the assertion of the state secret privilege were supported by the *in camera* affidavits of Secretaries of Defense Schlesinger, Rumsfield and Brown.

access by Jabara or his counsel. We conclude that the district court was correct in its ruling and, further, that this court likewise may properly receive *in camera* and so consider such materials in the classified appendix. *United States* v. *Reynolds*, 345 U.S. 1 (1953); *Kerr* v. *United States District Court for the Northern District of California*, 426 U.S. 394 (1976); and *Halkin* v. *Helms*, 598 F.2d 1 (D.C. Cir. 1978).

II.

To understand the fourth amendment issue raised by the NSA's interception of Jabara's communications and supplying these to the FBI, all without a warrant, it is necessary briefly to describe the factual background of this claim and then to outline the contentions of the parties.

The NSA intelligence gathering operation is described sufficiently for present purposes in *Halkin*, 598 F.2d at 4, as follows (footnote omitted):[4]

> A brief description of NSA and its functions is appropriate. NSA itself has no need for intelligence information; rather, it is a service organization which produces intelligence in response to the requirements of the Director of Central Intelligence. Intelligence Activities: Hearings Before the Select Comm. to Study Governmental Operations with Respect to Intelligence Activities of the U.S. Senate, 94th Cong., 1st Sess. Vol. V at 9 (1975) (Hearings). The mission of the NSA is to obtain intelligence from foreign electrical communications. Signals are acquired by many techniques. The process sweeps up enormous numbers of communications, not all of which can be reviewed by intelligence analysts. Using "watchlists"—lists of words and phrases designed to identify communications of intelligence interest—NSA computers scan the mass of acquired communications to select those which may be of specific foreign intelligence interest.

[4] *See also*: Note, *Government Monitoring of International Electronics Communications: National Security Agency Watch List Surveillance and the Fourth Amendment*, 51 S. Cal.L.Rev. 429 at 431 (1978).

> Only those likely to be of interest are printed out for further analysis, the remainder being discarded without reading or review. Intelligence analysts review each of the communications selected. The foreign intelligence derived from these signals is reported to the various agencies that have requested it (Hearings at 6). Only foreign communications are acquired, that is, communications having at least one foreign terminal (Hearings at 9).

On November 1, 1971, the FBI, without a warrant, requested the NSA to supply it with the contents of Jabara's telegraphic communications sent overseas, and the NSA complied by furnishing the FBI with summaries of six of such communications.

Defendants contend that the fourth amendment does not apply to and limit NSA's gathering of foreign intelligence. They also contend that, in any event, the facts surrounding the acquisition by the NSA of overseas telegraphic communications such as those sent by Jabara are subject to the state secret privilege.[5]

Jabara, however, does not even contend on this appeal that the interception by the NSA violated his fourth amendment rights; we may therefore take as a given that the information was legally in the hands of the NSA. What Jabara does contend, and the district court agreed, is that his rights were violated when the NSA turned over the information, without a warrant, to the FBI. Defendants, on the other hand, contend that, since the NSA had lawfully intercepted and had made a record of the content of Jabara's communications, the fourth amendment was not implicated when the FBI requested and obtained the summaries from the NSA. This is so, defendants contend, because there simply was no "search" or "seizure"

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[5] This was so held in *Halkin*, *supra*; indeed in *Halkin*, it was held that, pursuant to the state secret privilege, the government did not even have to divulge to plaintiffs whether the NSA had intercepted their overseas communications. Here, as previously indicated, the government has divulged in the open record that NSA did intercept and later turn over to the FBI Jabara's communications.

when this information was turned over to another agency of the government.

Defendants still further contend that, even if there was a "search" or "seizure" when the FBI obtained the summaries from the NSA, a warrant was not required because there is a "foreign agent" exception to the warrant requirement and the foreign agent exception was applicable here since, at the time the FBI made the request for the summaries, it had reasonable cause to believe that Jabara was in fact a foreign agent. Jabara, on the other hand, contends that there is no foreign agent exception to the warrant requirement and that, in any event, at the time the FBI made the request, it had no reasonable cause to believe that he was a foreign agent.

In connection with defendants' contention that the FBI had reasonable cause to believe that Jabara was a foreign agent when it requested the summaries, there is a threshold procedural issue. After the district court had made its decision that Jabara's fourth amendment rights were violated when the summaries were supplied to the FBI (476 F.Supp. 561 (1979)), defendants moved for reconsideration and filed additional open and *in camera* affidavits[6] to support their contention that, at the time the FBI made the request for the summaries, it had reasonable cause to believe that Jabara was a foreign agent. The defendants argued, in support of their motion to reconsider, that they had been surprised by the court's decision that the FBI's acquisition of the summaries was a fourth amendment violation since they had thought that the controlling issue was the legality of the NSA's interception of the overseas telegraphic communications. Defendants further argued that, since the NSA's interception of the overseas

[6] These affidavits were executed by Special Agent French of the FBI, who is in the Records Management Division in Washington. Defendants contend that these affidavits, particularly the *in camera* one, demonstrate that on the day the FBI requested the summaries of Jabara's overseas communications from NSA, November 1, 1971, it had received solid information from the Central Intelligence Agency that Jabara was, indeed, a cadre member of a Middle East terrorist organization.

telegraphic communications in performance of its foreign intelligence function did not invade Jabara's fourth amendment rights whether or not Jabara was a foreign agent, they had no reason to emphasize the FBI's reasonable belief that he was. The district court, in its unreported memorandum denying the motion to reconsider (App. at 190), determined that the question whether there was cause to believe Jabara was a foreign agent had been an issue in the case and that it had theretofore determined (75 F.R.D. at 493) that, in the record then before it, there was no evidence that Jabara was connected with or was a foreign agent.[7] The district court further determined that the additional affidavits executed by FBI agent French and filed in support of the motion to reconsider (as proof of a reasonable belief that Jabara was a foreign agent) contained no information that had not been available to defendants throughout the litigation. The district court denied the motion to reconsider because the foreign agent status of Jabara had been in issue and because the information in the additional affidavits had been available to defendants prior to the grant of summary judgment. Defendants contend on appeal that the district court did not even consider, as they contend it should have, the additional *in camera* affidavit of Agent French in making its decision to deny the defendants' motion to reconsider the grant of summary judgment, while Jabara contends that the district court did consider it. It appears to us that the district court only determined that the information contained in these French affidavits had been available all along and did not weigh and determine whether the *in camera* affidavit demonstrated that there was reasonable cause to believe that Jabara was a foreign agent. Since, however, we determine herein that Jabara's fourth amendment rights were not violated when the sum-

[7] We agreed that, as the record stood at the time the district court granted summary judgment to Jabara, it did not support reasonable cause to believe that Jabara was a foreign agent when the FBI requested the summaries from the NSA.

maries of his overseas telegraphic messages were furnished to the FBI irrespective of whether there was reasonable cause to believe that he was a foreign agent and whether there is a foreign agent exception to the warrant requirement, we need not consider the question whether the district court abused its discretion in not weighing the contents of the *in camera* French affidavit and whether the affidavit established such reasonable cause.

The district court, in determining that Jabara's fourth amendment rights were violated when the FBI, without a warrant, obtained the summaries of his overseas telegraphic communications, distinguished the holding of the District of Columbia Circuit in *Halkin* v. *Helms*, 598 F.2d 1 (1978). There the court held (see note 5 herein at page 5) that application of the state secret privilege required dismissal of plaintiffs' claims based on alleged interception by the NSA of their overseas communications because the fact of interception need not be and was not divulged. Here, on the other hand, defendants had divulged the interception and later transmittal to the FBI.[8] Thus, the district court reasoned, the state secret privilege was no impediment to the adjudication of Jabara's fourth amendment claim. The district court went on to hold, citing *Katz* v. *United States*, 389 U.S. 347 (1967), that the fourth amendment was implicated since Jabara had a reasonable expectation of privacy with respect to his overseas telegraphic communications. The district court further held that, since the record, classified or otherwise, did not reveal evidence that Jabara was a foreign agent or was acting in collaboration with a foreign agent, even if there is a foreign agent exception to the warrant requirement, the exception could not be applied here. The district court therefore granted summary judgment and injunctive relief to Jabara. 476 F.Supp. at 577-579.

As heretofore stated, Jabara does not contend on appeal that

[8] As pointed out in *Halkin*, 598 F.2d at 9, it is not altogether clear why this disclosure was made by the defendants in the instant case.

the NSA's interception of his foreign telegraphic communications violated his fourth amendment rights, and therefore we may take as a given the proposition that the NSA lawfully received and was in possession of the communications. From this proposition defendants argue, we think correctly, that Jabara's fourth amendment rights were not violated when the summaries were turned over to the FBI because this was not a "search" or "seizure" within the meaning of the amendment. This is a clear implication of such decisions as *United States* v. *Gargotto*, 476 F.2d 1009 (6th Cir. 1973), *cert. denied*, 421 U.S. 987 (1975). There an arson investigator gathered some papers from the floor of the burned building as evidence of the cause of the fire. These papers were later turned over to federal agents when they appeared to be gambling records. The court held that the papers were lawfully in the possession of the arson investigator under the "plain view" exception. It further held that the federal agents lawfully obtained possession from the arson investigator, stating (476 F. 2d at 1014):

> Evidence legally obtained by one police agency may be made available to other such agencies without a warrant, even for a use different from that for which it was originally taken. Gullett v. United States, 387 F.2d 307 (8th Cir. 1967), cert. denied 390 U.S. 1044, 88 S.Ct. 1645, 20 L.Ed.2d 307 (1968).

The holding by our court in *Gargotto* was followed by our court in *United States* v. *Lewis*, 504 F.2d 92, 104 (6th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975).

Jabara contends, however, that there was a "search" or "seizure" when the summaries were turned over by the NSA to the FBI under the holding in *Walter* v. *United States*, 447 U.S. 649 (1980). There some pornographic 8-millimeter films, in boxes that were in sealed packages, were misdelivered after shipment, and the recipient opened the packages. On the boxes were descriptions and drawings that clearly indicated their contents. The recipient, however, did not view the films

but turned them over to an FBI agent. FBI agents, then, without a warrant, viewed the films with a projector. The question before the Court was whether the films should have been suppressed because the showing of the films with a projector was an illegal search under the fourth amendment.

In a five-to-four decision, the Court held that the showing of the film with a projector was a "search" and therefore the showing violated the fourth amendment. Justice Stevens authored the lead opinion for the majority, saying (447 U.S. at 654):

> [N]otwithstanding that the nature of the contents of these films was indicated by descriptive material on their individual containers, we are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances.
>
> It is perfectly obvious that the agents' reason for viewing the films was to determine whether their owner was guilty of a federal offense. To be sure, the labels on the film boxes gave them probable cause to believe that the films were obscene and that their shipment in interstate commerce had offended the federal criminal code. But the labels were not sufficient to support a conviction and were not mentioned in the indictment. Further investigation—that is to say, a search of the contents of the films —was necessary in order to obtain the evidence which was to be used at trial.
>
> The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents. Ever since 1878 when Mr. Justice Field's opinion for the Court in Ex parte Jackson, 96 US 727, 24 L Ed 877, established that sealed packages in the mail cannot be opened without a warrant, it has been settled that an officer's authority to possess a package is distinct from his authority to examine its contents.

(Citations and footnotes omitted).

In the instant case, on the contrary, Jabara's very words, summaries of which were supplied to the FBI, had been lawfully intercepted by and were in the records of the NSA. NSA therefore already had in its records, after it intercepted, all that it supplied to the FBI. Jabara appears to argue, however, that the fact that the NSA acquired, stored and retrieved a large amount of information using sophisticated, high-technology methods and equipment should lead to the conclusion that the NSA's acquisition of Jabara's telegraphic messages was not a search and that the only search occurred when, at the request of the FBI, the NSA retrieved Jabara's messages and delivered summaries to the FBI. There are two difficulties with this argument. First, the simple fact remains that the NSA lawfully acquired Jabara's messages, and these are all that it delivered to the FBI. Second, to the extent that Jabara relies on alleged facts surrounding the methods and technology of acquisition, storage and retrieval of information, such are, as was held by the district court, subject to the state secret privilege. It was recognition of the effect of the privilege that caused the district court to limit its consideration to the question whether the targeting of Jabara's communications by the FBI, in obtaining the summaries from the NSA, was a fourth amendment violation irrespective of the facts surrounding the acquisition, storage and retrieval of the information by the NSA.

Jabara, however ,would have us apply still another analysis in support of his contention that his fourth amendment rights were violated when the FBI, without a warrant, requested and received summaries of his overseas messages. In this connection he relies on such cases as *United States* v. *Bailey*, 628 F.2d 938 (6th Cir. 1980). In *Bailey*, government undercover officers delivered a drum of a chemical, a precursor for the manufacture of a controlled substance, to defendant. The officers had installed a "beeper" inside the drum to aid in the surveillance and investigation of a suspected clandestine

laboratory. The signal from the beeper was used by the officers to ascertain the location of the drum. The question raised was whether the placing of the beeper in the drum before it was delivered to defendant and the subsequent tracing of the drum by receipt of the signal from the beeper implicated the fourth amendment. In reaching the conclusion that the fourth amendment was implicated, our court, relying on *Katz* v. *United States*, 389 U.S. 347 (1967), held that the question was whether defendant had a reasonable expectation of privacy with respect to the location of the drum. In this connection, our court stated (628 F. 2d at 940):

> We consider it irrelevant whether a particular governmental intrusion is classified as a "search" or as a "seizure." What matters is whether it violates an individual's legitimate expectation of privacy. Therefore, it is not necessary to speculate whether a beeper "searches" or "seizes" anything.

Our court then quoted (628 F.2d at 941) from Justice Harlan's concurring opinion in *Katz* to the effect that, while a reasonable expectation of privacy is the test, this means that the person asserting the claim must have exhibited an actual (subjective) expectation of privacy and that the expectation must be one that society is prepared to accept as reasonable.

Applying this analysis utilized by our court in *Bailey*, we agree that Jabara exhibited an actual (subjective) expectation of privacy when he sent the telegraphic messages overseas. But the question here is whether he had an expectation of privacy that society is prepared to recognize as reasonable *after the messages had lawfully come into the possession of the NSA*. For it was *after* the messages were intercepted and within the possession of the NSA and only when they were delivered to the FBI that Jabara contends that his fourth amendment rights were violated. We do not believe that an expectation that information lawfully in the possession of a government agency will not be disseminated, without a war-

rant, to another government agency is an expectation that society is prepared to recognize as reasonable. In this connection, we believe that it is irrelevant that Jabara did not know that the NSA had intercepted his messages. To hold otherwise would in many instances require, for fourth amendment purposes, a succession of warrants as information, lawfully acquired, is passed from one agency to another.

We conclude, therefore, that Jabara's fourth amendment rights were not violated when the FBI obtained summaries of his overseas telegraphic communications from NSA and that the district court erred in granting summary judgment to Jabara and that, on the contrary, it should have granted summary judgment to defendants as to this claim.[9]

III.

The district court also granted summary judgment to Jabara with respect to his claim that the FBI had violated a provision in the Privacy Act, 5 U.S.C. § 552a(e)(7), which provides that an agency shall:

> (7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or *unless pertinent to and within the scope of an authorized law enforcement activity.*

(Emphasis added).

In construing the emphasized words in this statute, the district court concluded (476 F.Supp. at 581):

> Given this definition, it is difficult to conclude that the self-contained exemption in § 552a(e)(7) relating to law

[9] In note 5, *Halkin* v. *Helms*, 598 F.2d at 4 (D.C. Cir. 1979), it is pointed out that, as a result of Exec. Order No. 12.036, 43 Fed. Reg. 3673 (1978), requests such as that made by the FBI here are screened by a Policy Review Committee of the National Security Council and must be validated as legitimate foreign intelligence needs.

> enforcement activity applies to any records which do not relate to specific past, present or future criminal acts.

The district court then determined, based upon the record before it, that the FBI's investigation that involved Jabara's first amendment activities did not relate to specific past, present or future criminal acts.

It thereupon entered an order providing that (App. at 197):

> Defendants and their successors in office are enjoined from recording, maintaining, using or disseminating information about the Plaintiff's political beliefs, communications, speeches, writings, associations or activities, both public or private, which do not relate to specific criminal acts.

Defendants then submitted the motion to reconsider the grant of summary judgment to Jabara on the claimed violation of the Privacy Act, which motion was supported by legislative history with respect to this statutory provision and by the aforementioned French open and *in camera* affidavits with respect to defendants' contention that, at least after November 1, 1971, the FBI had reasonable cause to believe that Jabara was a cadre member of a Middle East terrorist organization. The district court denied the motion to reconsider, stating that the defendants were tardy, without excuse, in supplying the legislative history and that, again, the facts set out in the French affidavits were known to the defendants prior to the grant of summary judgment.

Defendants contend that the legislative history demonstrates that the exemption in § 552a(e)(7) ("unless pertinent to and within the scope of an authorized law enforcement activity") allows investigation with respect to the exercise of first amendment rights if such investigation is relevant to an authorized criminal investigation or to an authorized intelligence or administrative one (Defts'. brief at 36).

Jabara reads the legislative history similarly and comes close

to agreeing with defendants' construction of the exemption in the statute, stating:

> By its terms and legislative history the subsection does not bar the maintenance of records describing how a person exercises First Amendment rights if there is a direct nexus to an authorized criminal, civil or administrative law enforcement activity.

(Jabara's brief at 39-40).

We agree with both Jabara and the defendants that the district court's construction of the exemption in the statute, limiting it to investigation of past, present or fuure criminal activity, is too narrow. Moreover, if there is any difference of substance between Jabara's formulation and defendants' formulation of the effect of the exemption, we believe that the defendants' is, in the light of the legislative history, the more reasonable one.

It appears, then, that in granting summary judgment to Jabara on the Privacy Act claim, the district court applied too narrow a test in determining that the FBI's investigative conduct did not come within the statutory exemption. For this reason, we believe that the summary judgment should be vacated and the case remanded to the district court for application of a correct legal standard. In doing so, the district court, of course, is free to reconsider its prior decision not to consider and weigh the effect of the French *in camera* affidavit.

The judgments of the district court are therefore vacated and the case is remanded for further proceedings not inconsistent with this opinion.

No. 80-1391

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABDEEN M. JABARA,

Plaintiff-Appellee,

v.

L. PATRICK GRAY, et al.,

Defendants-Appellants

Filed December 17, 1982

ORDER DENYING PETITION TO REHEAR

Before: MARTIN, Circuit Judge; PECK and BROWN, Senior Circuit Judges.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc; and a majority of the active judges on this court not having favored rehearing en banc; and the petition for rehearing therefore having been referred to the panel which heard the case;

And further, the panel having noted

nothing of substance in said petition for rehearing which had not been carefully considered before issuance of the court's opinion;

Now, therefore, the motion for rehearing is hereby DENIED.

This court recognizes the concern and the contention of Jabara that the interception of overseas telegraphic communications by the NSA and supplying the contents thereof to other federal agencies has great potential for abuse. At the same time, as pointed out in this court's opinion, application of fourth amendment analysis does not lead to the conclusion that such was a violation of that amendment. Accordingly, we believe that the problem presented here is a policy matter that lies in the domain of the executive or the legislative branch of our government. Cf. Classified Information Procedures Act, Pub.L. 96-456, Oct, 15,

1980, 94 Stat. 2025, 18 U.S.C.A. App. (1980) at 157, which has to do with discovery as to state secrets in criminal prosecutions.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

No. 80-1391

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABDEEN M. JABARA,

Plaintiff-Appellee,

v.

L. PATRICK GRAY, et al.,

Defendants-Appellants.

Filed December 22, 1982

ORDER

The order of the court of December 17, 1982, denying the petition for a rehearing en banc is hereby amended to include the following dissent from Circuit Judge Merritt:

> "I believe that Jabara's Fourth Amendment rights were probably violated when the FBI, without a warrant, requested and received summaries of Jabara's overseas messages. I am of the opinion that the issue is of sufficient importance to require a hearing by the full Court."

It is so ORDERED.

Circuit Judge Jones concurs in the foregoing dissent.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

Supreme Court, U.S.
FILED
JUL 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1682

In the Supreme Court of the United States

OCTOBER TERM, 1983

ABDEEN M. JABARA, PETITIONER

v.

WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires a federal agency to secure a warrant before obtaining international electrical communications lawfully in the possession of another federal agency.

2. Whether Subsection (e)(7) of the Privacy Act, 5 U.S.C. 552a(e)(7), prohibits a federal agency from collecting and maintaining records reflecting the exercise of First Amendment rights when those records are pertinent to an authorized national security investigation.

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In the Supreme Court of the United States

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ABDEEN M. JABARA, PETITIONER

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WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 90-103) is reported at 691 F.2d 272. The opinion of the district court on the motions for summary judgment (Pet. App. 1-83) is reported at 476 F. Supp. 561. Earlier opinions of the district court on issues relating to discovery are reported at 75 F.R.D. 475 and 62 F.R.D. 424.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1982, and a petition for rehearing was denied on December 17, 1982. The order denying the petition for rehearing was amended on December 22, 1982. On March 8, 1983, Justice O'Connor extended the time in which to file a petition for a writ of certiorari to April 16, 1983. The petition was filed on April 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Detroit lawyer active in pro-Arab causes. In 1967, the Federal Bureau of Investigation initiated a national security investigation of petitioner. In large measure, the FBI's investigative activities were a response to classified reports it received indicating that petitioner was a cadre member of Al Fatah, a Middle Eastern terrorist group.[1] As part of its investigation, the FBI asked the National Security Agency (NSA) for summaries of any international communications concerning petitioner that it had acquired. Pet. App. 90.[2]

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[1]These reports are discussed in various classified affidavits submitted to the district court, especially the In Camera Affidavit of Jack French paras. C and D (Aug. 27, 1979) (Class. App. 2-4) ("Class. App." refers to the Classified Appendix filed with the court of appeals). See also In Camera Affidavit of James Williamson para. 2(c)(iii) (Sept. 9, 1973) (Class. App. 2-4) and In Camera Affidavit of Robert Peterson para. (B) (Dec. 10, 1974) (Class. App. 13-18).

As the court of appeals explained (Pet. App. 94-96), material concerning petitioner's membership in Al Fatah was not disclosed to the district court before it rendered its decision because the government believed that the district court's decision to uphold the government's claim of state secrets privilege with respect to information concerning the National Security Agency's monitoring (see 75 F.R.D. at 492) had removed from the case any issues to which the sensitive material bearing on petitioner's membership in Al Fatah might be relevant. After the district court granted summary judgment in favor of petitioner on his Fourth Amendment claim, the government moved for reconsideration and offered, in camera, the affidavit relating to petitioner's membership in Al Fatah. The district court denied the motion for reconsideration. Pet. App. 83a-83b. The court of appeals expressly declined to rule on the correctness of the district court's denial of this motion. *Id.* at 95-96.

Petitioner was advised during proceedings in the court of appeals of the existence of information indicating that he was a member of Al Fatah. The specific nature of this information remains classified and has not been disclosed to petitioner.

[2]The NSA conducts electronic surveillance of international electrical communications—that is, communications having at least one terminus outside the United States. See Pet. App. 92-93.

The NSA furnished the FBI summaries of seven international telegrams, the contents of which were already in its possession when it undertook to respond to the FBI's request.[3] These telegrams were all sent or received by petitioner, and they were all sent to or from points outside the United States. See In Camera Affidavit of Secretary Harold Brown paras. 7-9 (Mar. 12, 1977) (Class. App. 78-81). They, like other international communications monitored by the NSA, were acquired by highly secret techniques. See Pet. App. 92-93.

2. Petitioner brought this action for damages and injunctive and declaratory relief against several current and former government officials. He claimed, among other things, that the FBI's investigation violated his rights under the Fourth Amendment and the Privacy Act of 1974, 5 U.S.C. 552a. In preliminary proceedings, the United States District Court for the Eastern District of Michigan ruled, with respect to the communications obtained from the NSA, that "the disclosure of the reports and summaries of [petitioner's] communications as well as their nature or mode and the means by which they were obtained would compromise a highly valuable source of foreign intelligence with serious adverse consequences to the capability of the President to conduct foreign affairs and to carry out his national defense responsibilities." 75 F.R.D. at 492. The court accordingly held that this information was subject to the military and state secrets privilege. *Ibid.*

Subsequently, the district court granted partial summary judgment in favor of petitioner, ruling that the FBI's acquisition of his communications from the NSA violated his rights under the Fourth Amendment (Pet. App. 63-71) and

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[3]The court of appeals incorrectly stated (Pet. App. 93) that six communications were involved.

that the government had maintained records that concerned petitioner's exercise of his First Amendment rights in violation of the Privacy Act of 1974 (*id.* at 71-80).[4] In connection with petitioner's Fourth Amendment claim, the court stated (*id.* at 59): "[W]hile it is not clear that [petitioner] was the target of the NSA interceptions, it is apparent that the FBI specifically requested summaries of [petitioner's] foreign communications." The court did not hold that the NSA's interception of petitioner's communications required a warrant. See *id.* at 64-65, 68-69. Instead, it ruled that even after a person's communications have been lawfully intercepted by the NSA, "the targeting [of those communications] * * * for summarization, transmission to, and subsequent examination by other agencies [such as the FBI] must be done pursuant to prior judicial authorization akin to a warrant." *Id.* at 69.[5]

Petitioner's Privacy Act claim was that the government had violated 5 U.S.C. 552a(e)(7), which provides that an agency maintaining a system of records shall:

> maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute * * * or unless pertinent to and within the scope of an authorized law enforcement activity.

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[4]The district court ordered injunctive relief. Pet. App. 86-87, 88-89. The court also dismissed several of petitioner's other claims and ordered that a trial be held on his claim that the investigation violated his First Amendment rights. Pet. App. 84-88. The district court had bifurcated the proceedings and accordingly did not address the damages claims against individual officials.

[5]The court acknowledged that a warrant is not required for foreign intelligence surveillance of an agent of a foreign power (Pet. App. 55-56, 66), but it declined to hold that petitioner was a foreign agent (*id.* at 70; see page 2 note 1, *supra*).

The district court found that the FBI had maintained records pertaining to petitioner's "expression of his political views in public and private speeches" (Pet. App. 75). The court then ruled that the maintenance of these records could not be justified under the "authorized law enforcement activity" exception because they "do not relate to [any] specific past, present or future criminal acts." *Id.* at 77.

3. The court of appeals vacated the judgment of the district court. It noted that petitioner "does not even contend * * * that the interception by the NSA violated his fourth amendment rights" (Pet. App. 93). The court accordingly assumed "that the NSA lawfully received and was in possession of the communications" (*id.* at 97). The court then rejected petitioner's contention that "his rights were violated when the NSA turned over the information, without a warrant, to the FBI" (*id.* at 93).

The court of appeals explained that the NSA's delivery of petitioner's communications to the FBI "was not a 'search' or 'seizure' within the meaning of the [Fourth A]mendment" (Pet. App. 97), for the following reasons (*id.* at 100-101):

> We do not believe that an expectation that information lawfully in the possession of a government agency will not be disseminated, without a warrant, to another government agency is an expectation that society is prepared to recognize as reasonable. * * * To hold otherwise would in many instances require, for fourth amendment purposes, a succession of warrants as information, lawfully acquired, is passed from one agency to another.

The court of appeals also vacated the district court's holding on the Privacy Act issue. It noted that both petitioner and respondents appeared to "agree * * * that the

district court's construction of the ['authorized law enforcement activity'] exemption in the statute, limiting it to investigation of past, present, or future criminal activity, is too narrow" (Pet. App. 103). The court of appeals noted that there was little difference between respondents' interpretation of the exemption—that it permits an "investigation with respect to the exercise of first amendment rights if such investigation is relevant to an authorized criminal investigation or to an authorized intelligence or administrative [investigation]" (*id.* at 102)—and petitioner's interpretation, that it permits such an investigation " 'if there is a direct nexus to an authorized criminal, civil or administrative law enforcement activity' " (*id.* at 103, quoting Pet. C.A. Br. 40). The court stated that "if there is any difference of substance between" these two interpretations, it believed respondents' to be more consistent with the legislative history (Pet. App. 103). The court then remanded to allow the district court to apply the correct standard. *Id.* at 103.[6]

ARGUMENT

1.a. The principal question presented by petitioner concerns whether the government should have obtained a warrant before examining his international electrical communications. In 1978—after this suit was brought, and after the FBI closed its investigation of petitioner (see Pet. App. 10)[7]—Congress specifically addressed this issue. The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. V) 1801-1811, establishes procedures for conducting electronic surveillance within the United States for foreign

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[6]The court of appeals expressly noted that the district court would be free, on remand, to take into account the materials relating to petitioner's acting as an agent for Al Fatah that it had previously refused to consider. Pet. App. 103; see page 2 note 1, *supra*.

[7]The district court held that the FBI's decision to end its investigation of petitioner did not render this case moot. Pet. App. 10-15.

intelligence purposes. The Act specifically requires a court order for "the acquisition * * * of the contents of any wire or radio communication" sent or received by a "United States person"[8] who is in this country "if the contents are acquired by intentionally targeting that United States person" (50 U.S.C. (Supp. V) 1801(f)(1)). The Act also requires a court order for the acquisition (within the United States) of any wire communication to or from any individual within the United States. 50 U.S.C. (Supp. V) 1801(f)(2).[9]

Today, therefore, if a government agency sought to obtain electrical communications sent to or from petitioner while he was in the United States, it would have to secure a court order.[10] The Fourth Amendment question presented by petitioner is therefore likely to have little if any practical significance beyond this case and does not merit this Court's review.

b. In addition, the court of appeals correctly disposed of petitioner's claim on this point.[11] As that court repeatedly

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[8]The term "United States person" includes citizens, aliens lawfully admitted for permanent residence, and certain associations. See 50 U.S.C. (Supp V) 1802(a).

[9]In certian limited circumstances not relevant here, such communications may be acquired on the basis of an Attorney General order. See 50 U.S.C. (Supp. V) 1802(a).

[10]Electronic surveillance of persons outside the United States is now governed by Exec. Order No. 12333, 3 C.F.R. 200, which provides that the use of any technique against a United States citizen abroad that would require a warrant if undertaken for law enforcement purposes cannot be undertaken except with the approval of the Attorney General upon a determination "in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power." Exec. Order No. 12333, Part 2.5, 3 C.F.R. 212.

[11]Petitioner suggests (*e.g.*, Pet. 7) that the FBI's investigation of him was prompted by hostility to his political views. If this were true, it might state a violation not of the Fourth Amendment but of petitioner's First Amendment rights. The district court did not grant summary

noted (Pet. App. 93, 96-97, 100), petitioner conceded below that the NSA's interception and acquisition of his communications were lawful. Despite his somewhat extreme rhetoric, petitioner does not repudiate that concession in this Court. See, *e.g.*, Pet. 16-17.

Accordingly, as the court of appeals correctly noted, the only issue is whether a warrant was required before petitioner's communications could be transferred from one federal agency, which lawfully possessed them, to another. It is entirely clear that no warrant is required in such circumstances. See *United States* v. *Calandra*, 414 U.S. 338, 354 (1974); *United States* v. *Miller*, 425 U.S. 435, 443 (1976); cf. *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5-6 & n.5. Once a government agency lawfully has possession of information about a person, that person has no reasonable expectation that the agency will not reveal the information to others within the government who are carrying out their official responsibilities. Information is transferred from one agency to another on innumerable occasions (see 18 U.S.C. 2517(1)), and it has never been suggested that the Fourth Amendment requires a warrant before each such transfer. Indeed, petitioner cites no case in which a warrant was required for the intra-governmental transfer of information.

At some points, petitioner appears to assume that the NSA automatically records all electronic communications and retains them in a form inaccessible to humans; petitioner then argues that a "search" of his communications within the meaning of the Fourth Amendment occurred not when they were acquired but only when his particular communications were retrieved from the mass of raw data and reduced to an understandable form at the FBI's

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judgment on the First Amendment claim in petitioner's complaint, however, and that claim is still pending in the district court. See Pet. App. 48.

request. See Pet. 16-17, 27-33.[12] The premise of this argument, however, is that the NSA's warrantless activity—the constitutionality of which petitioner does not challenge—consisted of no more than the indiscriminate collection of all communications. See, *e.g.*, Pet. 29. This premise is not supported by the record. As we noted (page 3, *supra*), the district judge sustained a claim of military and state secrets privilege with respect to information concerning the means by which petitioner's communications were acquired.

If, for example, communications were acquired, not on an indiscriminate basis, but by highly selective monitoring—such as monitoring designed to acquire, so far as possible, only the communications of a particular foreign intelligence target—any "search" within the meaning of the Fourth Amendment might well occur at the time of the monitoring, not at some subsequent point when analysts sifted the acquired communications for useful data. But the extent to which the NSA's monitoring discriminates among communications is highly secret. Moreover, even if petitioner had not conceded the lawfulness of the NSA's monitoring, the privileged nature of information concerning the NSA's activities would make it impossible to assess the reasonableness of its monitoring.

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[12]Even if this argument were correct, it would not follow that the Fourth Amendment required a warrant. As noted above, the government had reason to believe that petitioner was an agent of a foreign power, and the courts of appeals have consistently held that a warrant is not required for electronic surveillance of the communications of foreign agents as part of a foreign intelligence investigation. See *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 913-916 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982); *United States* v. *Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States* v. *Butenko*, 494 F.2d 593, 605-606 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Brown*, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974). Compare *Chagnon* v. *Bell*, 642 F.2d 1248, 1259 (D.C. Cir.), cert. denied, 453 U.S. 911 (1981), with *Zweibon* v. *Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1975) (en banc) (plurality opinion) (dictum), cert. denied, 425 U.S. 944 (1976).

Similarly, petitioner acknowledges that if his "messages had been intelligible when monitored, the constitutional injury would * * * have occurred fully at that point" (Pet. 33 n.40; emphasis omitted) and the subsequent transfer to the FBI would not require a warrant. But there is no basis in the record for concluding that petitioner's messages were not reduced to intelligible form when they were acquired or at some point thereafter, independently of the FBI's request. Because petitioner's claim depends, in these ways, upon his speculative assertions about privileged matters, the court of appeals properly ordered that it be dismissed. See *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139, 146-147 (1981), quoting *Totten* v. *United States*, 92 U.S. 105, 107 (1876) (" '[P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.' ").[13]

2. The district court held that the "authorized law enforcement activity" exception to Subsection (e)(7) of the Privacy Act covers only law enforcement activity "relate[d] to * * * specific past, present or future criminal acts." Pet. App. 77. Petitioner has not defended this interpretation of the statute in either the court of appeals (see *id.* at 102-103) or this Court. See Pet. 37-38 n.42 ("Petitioner does not contend that the 'law enforcement activity' exemption

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[13]Petitioner is plainly wrong in his repeated assertions (*e.g.*, Pet. 22-23, 34-35) that the court of appeals' approach permits the government to examine all communications to which it can gain electronic access. As we noted, the court of appeals repeatedly made clear its reliance on petitioner's concession that the initial acquisition of the communications by the NSA did not require a warrant. See Pet. App. 93, 96-97, 100. The court's holding is therefore relevant only when information is initially lawfully acquired.

necessarily requires an investigative focus on specific *criminal* activity"). The court of appeals was, therefore, plainly correct in vacating the district court's judgment on this issue and remanding, and while petitioner objects to the standard the court of appeals ordered the district court to apply on remand, he has been unable to specify with any precision the alternative standard he endorses. Indeed, the court of appeals was uncertain whether petitioner's interpretation of Subsection (e)(7) differed from respondents' at all. In view of the poorly focused and highly abstract nature of the issue at this point, and the interlocutory posture of this aspect of the case, further review at this time is inappropriate.

In any event, the legislative history of the "authorized law enforcement activity" exception to Subsection (e)(7) demonstrates that it embraces an authorized national security investigation. The phrase "authorized law enforcement activity" was added as a floor amendment to the provision that became Subsection (e)(7). Rep. Ichord, the sponsor of this amendment, explained that without it the prohibition against the collection of information reflecting the exercise of First Amendment rights "can be construed to cover activities which are properly within the scope of legitimate law enforcement. * * * The terms of the broad prohibitions * * * would, for example, embrace the activities of the Communist Party and similar groups * * * [or] certain sects within the Black Muslim movement, which have been described by the Director of the FBI as endangering the internal security" (120 Cong. Rec. 36650 (1974)). He then further elaborated (120 Cong. Rec. 36651 (1974) (emphasis added)):

> **In referring to a "law enforcement activity" * * * I am, of course, using the expression "law enforcement" in its general meaning and in the broadest reach of the term. I include within that term those purposes and activities**

> which are authorized by the Constitution, or by statute, or by the rules and regulations and the executive orders issued pursuant thereto. Thus, the investigatory material maintained shall include, but not be limited to, that which is compiled or acquired by any federal agency in connection with and for the purpose of determining initial or continuing eligibility or qualification for Federal employment, military service, Federal contracts, or access to classified information.
>
> I want to emphasize—so that there is no misunderstanding—*these changes are designed to protect only legitimate national or internal security intelligence and investigations*, and no records or files shall be kept on persons which are not within constitutional limitations. Let the legislative history be explicit. None of these changes are intended to abridge the exercise of first amendment rights. The rights of Americans to dissent in a lawful manner and for lawful purposes must be preserved.

Rep. Moorhead, the floor manager of the bill that became the Privacy Act (see 120 Cong. Rec. 36643) (1974)), accepted the amendment and stated that it was to be interpreted in light of Rep. Ichord's remarks. 120 Cong. Rec. 36651, 36957 (1974). Thus, as petitioner appears to acknowledge (Pet. 38-39), Rep. Ichord's remarks are authoritative, and these remarks could hardly be more explicit: national security intelligence investigations (like background investigations of prospective federal employees[14]) are "authorized law enforcement activity" within the meaning of Subsection (e)(7). The court of appeals was, therefore, clearly

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[14]Petitioner makes no effort to explain how Rep. Ichord's reference to background investigations can be reconciled with petitioner's vague proposal for a " 'violation-oriented' construction of subsection (e)(7)" (Pet. 44).

correct in holding that information concerning First Amendment rights could be maintained in a system of records if it was relevant to "an authorized intelligence or administrative [investigation]" (Pet. App. 102).

Petitioner asserts that the court of appeals' decision conflicts with *Clarkson* v. *IRS*, 678 F.2d 1368 (11th Cir. 1982). But *Clarkson* did not involve a national security investigation; the *Clarkson* court, therefore, simply did not confront the issue presented by this case. Indeed, the court noted in *Clarkson* that "the record in this case does not reveal * * * the purpose of the surveillance activities" (678 F.2d at 1375). The *Clarkson* court accordingly intimated that the government may have been collecting information about the exercise of First Amendment rights in the hope that that information might in some undetermined way prove useful in connection with law enforcement activities (678 F.2d at 1375). By contrast, the FBI investigated petitioner for national security reasons, and its acquisition of information about petitioner's exercise of his First Amendment rights was undertaken in the course of, and incident to, that legitimate investigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
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OCTOBER TERM, 1983

ABDEEN M. JABARA,

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WILLIAM H. WEBSTER, et al.,

Respondents.

REPLY OF PETITIONER TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Supreme Court Rule 22.5 1

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 82-1682

ABDEEN M. JABARA,

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v.

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Respondents.

REPLY OF PETITIONER TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

Pursuant to Rule 22.5 of the Rules of this Court, petitioner respectfully submits this reply to the brief for respondents in opposition to the instant petition for a writ of certiorari.

ARGUMENT

In their brief in opposition to the instant petition, respondents advance several

arguments for denying review of the judgment below. Avoiding rather than squarely confronting the important issues presented, the arguments advanced by respondents serve only to strengthen the case for review.

1. Respondents claim that, in light of the enactment of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-11 ("FISA"), "[t]he Fourth Amendment question presented by petitioner is . . . likely to have little, if any, practical significance beyond this case and [therefore] does not merit this Court's review." Government's Brief ("G.B.") 7. But the Sixth Circuit's judgment sweeps far beyond the circumstances in which a court order might be required under FISA for interception of overseas communications. On its face, the opinion below invites the government to ignore the teachings of Katz v. United States not only with respect to electronic surveillance of overseas

communications "for foreign intelligence purposes." G.B. 7. Just as critically, the opinion below affords a blank check for warrantless surveillance of purely domestic communications as well -- so long as the technology employed is sufficiently advanced. For according to the court below, it is the fact that a government agency has the technical capability to monitor the channels through which unintelligible signals carrying private communications are sent that renders lawful the warrantless interception and examination of particular communications sent over those channels. See Petition at 22-23, 33-35. And, needless to say, the opinion below undermines the Fourth Amendment rationale for FISA itself. The Fourth Amendment issue in this case, therefore, has broad and far-reaching significance indeed, and clearly warrants review.

2. Asserting that "petitioner conceded below that the NSA's interception and acquisition of his communications were lawful," G.B. 8, respondents maintain that the NSA's subsequent transfer of petitioner's communications to the FBI therefore plainly required no warrant. But petitioner nowhere made any such concession -- either below or in this Court -- and any suggestion in the opinion of the court below that he did is simply incorrect. What petitioner has argued throughout is that the warrant requirement came into play at the moment when government officials first acquired access to the contents of his private communications -- not when the contents of such communications were disseminated by the NSA to the FBI. Whether government officials first acquired such access when petitioner's private communications were electronically intercepted, see Katz v. United States, or at some subsequent

point, see Walter v. United States; cf. Smith v. Maryland, is immaterial. See Petition at 16-17 & n.27, 27-29, 32-33.[1] Nor does this case present any issue of "military [or] state secrets," G.B. 9, for the critical

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1 The Sixth Circuit's assertion that petitioner did not "contend . . . that the interception [of his private overseas communications] by the NSA violated his Fourth Amendment rights," 691 F.2d at 277, Pet. App. 93, quoted in G.B. 5, is radically misleading. Petitioner acknowledged below that, whatever the lawfulness of the NSA's warrantless monitoring of the channels over which his private communications were carried, no violation of his privacy occurred so long as the contents of his private communications remained "unnoticed and unread." Brief for Plaintiff-Appellee in Sixth Circuit at 22. But petitioner has strenuously protested throughout that his Fourth Amendment rights were violated when government officials, acting without a warrant, acquired access to the contents of his private communications -- that is, when the contents of his communications became subject to their "'analysis, summary, examination or dissemination.'" Id., quoting Partial Judgment (Pet. App. 87). See Brief for Plaintiff-Appellee in Sixth Circuit at 7, 20-22; Plaintiff-Appellee's Petition for Rehearing and Suggestion of Rehearing En Banc at 10-13.

question is not how or when but whether the warrantless interception and examination of petitioner's communications occurred. As the district court observed, respondents below admitted petitioner's allegation with respect to that "threshold and ultimate issue." 476 F. Supp. at 578, Pet. App. 63. See Petition at 13 n.18. The fact of such conceded interception and examination establishes the injury of which petitioner complains and fully supports his prayer for relief.

3. Notwithstanding their attempt to dismiss the Privacy Act issue as "poorly focused and highly abstract . . . at this point," G.B. 11, and notwithstanding their reference to the "interlocutory posture of this aspect of the case," id., respondents have offered no justification for denying review. First, there is nothing "interlocutory" about the disposition of the Privacy Act issue by the court below. If

the judgment below is reversed, the district court's injunction would become operative -- subject to any further direction from this Court on remand. If, on the other hand, the judgment below is sustained, the issue on remand would be the applicability in this case of the subsection (e)(7) standard embraced by the court below, not its correctness. The correctness of that standard is an issue petitioner may be barred from relitigating on remand as res judicata. Second, notwithstanding the self-contradictory remarks of Rep. Ichord quoted by respondents at G.B. 11-12, the legislative history of subsection (e)(7) unmistakably demonstrates that a federal agency may not, merely by waving the talisman of "national security," be allowed to maintain records describing an individual's entirely lawful exercise of First Amendment rights.

See Petition at 38-45.[2] Finally, although respondents attempt to distinguish Clarkson v. IRS on the ground that the investigation there was not "a national security investigation," G.B. 13, nothing in Clarkson -- or in the opinion of the court below -- even hints that the applicability of subsection (e)(7)'s ban on the maintenance of records describing an individual's exercise of First Amendment rights turns on whether the investigation is proclaimed to involve "national security." Instead, Clarkson holds that the maintenance of such records is barred absent some violation-oriented investigative focus; the

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2 Any suggestion that the construction of subsection (e)(7) advanced by petitioner would somehow bar "background investigations of prospective federal employees," G.B. 12 & n.14, is wholly without merit. The view suggested by respondents would permit government agencies, without limit, to compile information about how every American exercises First Amendment rights on the theory that anybody may someday be a candidate for federal employment.

court below, to the contrary, construed subsection (e)(7) to permit the maintenance of such records absent any such investigative focus. A conflict between two federal circuit courts could hardly be clearer.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the petition, review should be granted.

Respectfully submitted,

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